LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 302

ANTHONY J. PARISSI, PETITIONER,

vs.

TELECHRON, INC., AND GENERAL ELECTRIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 24, 1954

CERTIORARI GRANTED OCTOBER 25, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 302

ANTHONY J. PARISSI, PETITIONER,

vs.

TELECHRON, INC., AND GENERAL ELECTRIC COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from U.S.D.C., Northern District of New York	1	1
Docket entries	1	1
Clerk's certification	2a	2
Clerk's certificate to judgment	2b	2
Judgment	2c	3
Affidavit of service	2f	5
Notice of entry of judgment	2h	5
Notice of appeal	6	6
Bond (omitted in printing)	7	
Order nunc pro tunc	9	7
Affidavit of Harry A. Smith	10	7
Letter dated May 21, 1954 from Clerk of District Court to Messrs. Andros and Smith and reply dated May 24, 1954	12	9
Request to Clerk to certify and transmit partial record (omitted in printing)	14	
Clerk's certificate (omitted in printing)	16	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JAN. 5, 1955

—9451

	Original	Print
Proceedings in U.S.C.A. for the Second Circuit	18	10
Motion to dismiss appeal	18	10
Endorsement dismissing appeal	21	10
Judgment	22	11
Order removing original record, etc. (omitted in printing)	24	
Clerk's certificate (omitted in printing)	26	
Order granting certiorari	27	11

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Civil 3831

TELECHRON, INC. AND GENERAL ELECTRIC COMPANY,
Plaintiffs,

v.

ANTHONY J. PARISSI, Defendant

For Plaintiff: Whalen, McNamee, Creble and Nichols, Esqs., 75 State St., Albany, N. Y.

For Defendant: Andros and Smith, 90 State St., Albany, N. Y.

[fol. 2] DOCKET ENTRIES

1954

Apr. 22 Filed and entered Judgment in favor of Plaintiffs and that Plaintiffs recover from Defendant their costs in this action, etc.

May 25 Filed Notice of Appeal and Bond (Date of filing changed to May 21, 1954).

May 25 Mailed copy of Notice of Appeal to Whalen, McNamee, Creble and Nichols, Attys for Plaintiff, 75 State St., Albany, N. Y.

May 28 Filed Affidavit and Order and entered Order changing date of filing of Notice of Appeal to May 21, 1954.

June 3 Filed Request to Clerk to Certify and Transmit Partial Record.

[fol. 2a] In United States Court of Appeals for the Second Circuit

Telechron, Inc. and General Electric Company,
Plaintiffs-Appellees,

v.

Anthony J. Parissi, Defendant-Appellant

I, A. Daniel Fusaro, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the attached was included in a memorandum in support of appellees' motion to dismiss the appeal herein submitted to the court by counsel for the appellees on the argument of said motion in this court.

A. Daniel Fusaro, Clerk. (Seal.)

Dated: September 17, 1954.

[fol. 2b] United States of America

District Court Clerk's Office,
Northern District of New York:

I, G. A. Porter, Clerk of the District Court of the United States for the Northern District of New York, do hereby certify that I have compared the annexed copy of Judgment—Telechron, Inc. and General Electric Company against Anthony J. Parissi Civil 3831 with the original now on file in this office; that the same is a correct transcript therefrom and of the whole of said original.

In Testimony Whereof, I have caused the seal of the said Court to be affixed at the City of Utica, in said District, this 22nd day of April, A. D. 1954.

G. A. Porter, Clerk.

[fol. 2c] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

Civil Action No. 3831

TELECHRON, INC. AND GENERAL ELECTRIC COMPANY,
Plaintiffs,

v.

ANTHONY J. PARISSI, Defendant

JUDGMENT—April 21, 1954

This action having been tried before the Court, and the evidence and briefs having been considered, and the Court on April 12, 1954 having rendered its opinion and made findings of fact and conclusions of law, it is hereby

Ordered, Adjudged and Decreed:

1. That defendant is the owner of patents 2,444,748 and 2,512,775, and reissue patent 23,261.

2. That each of claims 7, 11, 16, 19 and 20 of patent 2,444,748 is invalid and void.

3. That each of claims 7, 11, 16 and 19-27 of reissue patent 23,261 is invalid and void.

4. That each of claims 10 and 11 of patent 2,512,775 is invalid and void.

5. That no subject matter disclosed in patent 2,444,748, patent 2,512,775 or reissue patent 23,261, or any related subject matter, was ever disclosed to either plaintiff in confidence or subject to an understanding, express or implied, that compensation would be paid to defendant therefor by either plaintiff.

6. That all flashing light alarm clocks, switch alarm clocks, electric clocks having a time controlled switch, [fol. 2d] radio alarm clocks, and radio receivers embodying or controlled by clocks, and all components thereof, manufactured and/or sold by each plaintiff were developed independently of any disclosure to either plaintiff by defendant.

7. That defendant has no rights in or based upon any subject matter disclosed in patent 2,444,748, patent 2,512,775 or reissue patent 23,261, or in or based upon ary re-

lated subject matter, whether those rights be said to arise under the patent laws, from a contract or understanding, express or implied in fact or in law, confidential disclosure, or otherwise, which have been violated by either plaintiff by the manufacture, use or sale of flashing light alarm clocks, switch alarm clocks, electric clocks having a time controlled switch, radio alarm clocks, radio receivers embodying or controlled by clocks, or any component of any of them, or otherwise.

8. That defendant's first and second counterclaims are hereby dismissed.

9. That defendant, his agents, servants, employees, attorneys and assigns, be and they hereby are enjoined from bringing any suit against either plaintiff, or any licensee of either plaintiff, or any purchaser or user of flashing light alarm clocks, switch alarm clocks, electric clocks having a time controlled switch, radio alarm clocks, or radio receivers embodying or controlled by clocks, or any components of any of them, manufactured or sold by either plaintiff or by any licensee of either plaintiff, (1) charging infringement of claims 7, 11, 16, 19 or 20 of patent 2,444,748, claims 7, 11, 16, 19-27 of reissue patent 23,261, or claim 10 or 11 of patent 2,512,775, or (2) charging that any other right of defendant in or based upon any subject mat-[fol. 2e] ter disclosed in any of these patents, or in or based upon any related subject matter, has been violated by either plaintiff, or by any licensee of either plaintiff, in any way, or by such purchaser or user by its possession, use or sale of any such clock, radio clock combination, or any component of any of them.

10. That plaintiffs recover from defendant their costs in this action, to be taxed by the Clerk of this Court and made part of this judgment.

James T. Foley, United States District Judge.

Albany, New York, April 21, 1954.

[fol. 2f] AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
County of Albany, ss:

Bertha Ulma, being duly sworn, deposes and says that she is over twenty-one years of age, and that on the 23rd day of April, 1954, at the Post Office in the City of Albany, New York, deponent deposited a copy of a Judgment, whereof the foregoing is a copy, properly enclosed in a post-paid wrapper, directed to Andros & Smith, Esqs., 90 State Street, Albany, New York, that being the address designated by them as attorneys for the defendant herein for such purposes.

Bertha Ulma.

Subscribed and sworn to before me this 23rd day of April, 1954. E. Mae Kingston, Notary Public, State of New York, Residing in Albany county, Albany County Clerk's No. 402. My commission expires March 30, 1955.

[fols. 2g-2h-5] [Endorsed:] Copy. Civil 3831, United States District Court, Northern District of New York. Civil Action No. 3831. Telechron, Inc. and General Electric Company, Plaintiffs, against Anthony J. Parissi, Defendant. Judgment. Whalen, McNamee, Creble & Nichols, Attorney for Plaintiffs, Office and Post-Office Address, 75 State Street, Albany, N.Y. Orig. filed Apr. 22, 1954, G. A. Porter, Clerk.

NOTICE OF ENTRY OF JUDGMENT

To: Andros & Smith, Esqs., Attorneys for Defendant.

SIRS:

Take Notice, that in the within entitled action, a Judgment whereof the within is a copy, herewith served upon you has been this day duly entered in the office of the Clerk

of the United States District Court for the Northern District of New York at Utica, New York.

Yours, &c., Whalen, McNamee, Creble & Nichols, Attorneys for the Plaintiffs, Office & Post Office Address, 75 State Street, Albany, New York.

Dated: April 22, 1954.

[fol. 6] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

Notice is hereby given that defendant, Anthony J. Parissi, hereby appeals to the United States Court of Appeals for the Second Circuit, from all parts of the Final Judgment entered in this action on April 22, 1954.

Andros and Smith, By Harry A. Smith, Attorneys for Defendant, 90 State Street, Albany, New York.

Dated: May 20, 1954.

To: Whalen, McNamee, Creble and Nichols, 75 State Street, Albany, New York.

[fols. 7-8] Bond on appeal for $250.00 omitted in printing.

[fol. 8a] [Endorsed:] Civil #3831 Telechron, Inc., and General Electric Company, Plaintiffs, v. Anthony J. Parissi, Defendant. Notice of Appeal and Bond. Original filed May 25, 1954. T. A. Santer, Clerk.

Changed to May 21, 1954 by order of May 28, 1954.

[fol. 9] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER NUNC PRO TUNC—May 27, 1954

On the annexed affidavit of Harry A. Smith, of counsel for defendant, it is hereby ordered that the Notice of Appeal in this action (from the judgment entered on April 22, 1954) received by the Clerk of the District Court on May 21, 1954, be accorded a filing date as of the day it was received, namely, May 21, 1954.

(S.) James T. Foley, United States District Judge.

Dated: May 27, 1954, Albany, N. Y.

[fol. 10] IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF NEW YORK

[Title omitted]

STATE OF NEW YORK,
County of Albany, ss:

AFFIDAVIT

Harry A. Smith, being first duly sworn, deposes and says:

That he is a member of the firm of Andros and Smith, of counsel for Anthony J. Parissi, defendant, in the above entitled action.

That on April 22nd, 1954, a judgment was entered in the District Court in favor of plaintiffs herein and from which defendant decided to appeal in accordance with Rule 73 of the Federal Rules of Civil Procedure which apparently allows thirty (30) days from the entry of judgment.

That on May 20th, 1954, he prepared a proper Notice of Appeal and, with an appeal bond in the sum of $250.00 as required attached thereto, sent the same to the Clerk's Office in Utica, by registered mail, and the same was received [fol. 11] by the Clerk the following day, namely, May 21st, one day before the expiration of the appeal date. However,

your deponent inadvertently failed to enclose a check for $5.00 as a filing fee. On that day, May 21st, which was on Friday, the Clerk wrote a letter addressed to deponent stating that he would not file the Notice of Appeal until a check for $5.00 was received. Deponent did not receive this letter until Monday, May 24th, and immediately sent such check by return mail. The clerk was also immediately notified by telephone and his instructions were to refer the same to the Judge of this Court.

That deponent, on the day the Notice of Appeal was sent by registered mail to the Clerk's Office, namely May 20th, 1954, had already notified counsel for plaintiffs that a Notice of Appeal was sent to the Clerk and arranged for a conference in New York City to determine whether a stipulation as to the contents of the record to be printed could be agreed upon.

That unless the Court orders that the Clerk now file the Notice of Appeal as of the time it was received by registered mail, namely, May 21st, 1954, it is feared that defendant may be foreclosed from proceeding with his appeal.

That, therefore, an order in effect permitting filing the Notice of Appeal nunc pro tunc is being submitted herewith.

Respectfully submitted, Harry A. Smith.

Subscribed and sworn to before me this 25th day of May, 1954. Carolyn D. Flinn, Notary Public. (L.S.)

[fol. 11a] [File endorsement omitted.]

[fol. 12] IN UNITED STATES DISTRICT COURT

Copy

May 21, 1954.

Messrs. Andros & Smith, 90 State St., Albany, N. Y.
Attention: Harry A. Smith, Esq.

DEAR SIR:

Re: Telechron and General Electric vs. Parissi, Civil 3831

Receipt is acknowledged of your letter of the 20th inst. inclosing in duplicate Notice of Appeal and Bond on Appeal in the above action.

I am obliged to withhold the filing, awaiting receipt of the statutory filing fee of $5.00. When this is received, I will send a copy of the notice of appeal to the opposing counsel.

Yours very truly, G. A. Porter, Clerk.

GP:AD.

[fols. 13-15] IN UNITED STATES DISTRICT COURT

Copy

Law Offices of Andros and Smith, 90 State Street
Albany, N. Y.

Charles H. Andros, Harry A. Smith.

May 24, 1954.

Hon. G. A. Porter, Clerk of U. S. District Court,
Utica, New York.

Re: Telechron and General Electric vs. Parissi—Civil Action No. 3831

DEAR SIR:

Enclosed is a check for $5.00 for the filing fee which we inadvertently failed to enclose with our Notice of Appeal in the above case.

Very truly yours, Andros & Smith, Harry A. Smith, P.W.B.

HAS:pwb.

Encl.

[fols. 16-17] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 18-20] In United States Court of Appeals for the Second Circuit

[Title omitted]

Motion to Dismiss—Filed June 10, 1954

Appellees move this Court to dismiss this appeal on the ground of lack of jurisdiction because the notice of appeal was not filed within 30 days from the entry of the judgment appealed from, as required by law.

Whalen, McNamee, Creble & Nichols, By Charles E. Nichols, Member of Firm, 75 State Street, Albany 1, New York, Attorneys for Appellees.

Of Counsel: Charles H. Walker, Fish, Richardson & Neave, 20 Exchange Place, New York 5, New York.

Dated: June 3, 1954.

[fol. 21] [File endorsement omitted.]

Appeal dismissed. H.B.C., J.N.F., C.C.H., U.S.C.J.J.

June 10, 1954.

[fols. 22-25] In United States Court of Appeals, Second Circuit

Present: Hon. Harrie B. Chase, Chief Judge, Hon. Jerome N. Frank, Hon. Carroll C. Hincks, Circuit Judges.

Telechron, Inc. and General Electric Company,
Plaintiffs-Appellees,

v.

Anthony J. Parissi, Defendant-Appellant

Judgment—Filed June 10, 1954

A motion having been made herein by counsel for the appellees to dismiss the appeal for lack of jurisdiction,

Upon consideration thereof, it is ordered that said appeal be and it hereby is dismissed. Further ordered that a mandate issue accordingly.

A. Daniel Fusaro, Clerk.

[fol. 26] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 27] Supreme Court of the United States, October Term, 1954

No. 302

[Title omitted]

Order Allowing Certiorari—Filed October 25, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
AUG 24 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM

No. 302

ANTHONY J. PARISSI,

Petitioner,

v.

TELECHRON, INC., and
GENERAL ELECTRIC COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES P. BAUER,
Counsel for Petitioner,
233 Broadway,
New York, N. Y.

f Counsel:
HARRY A. SMITH and
CHARLES H. ANDROS,
90 State Street,
Albany, New York.

SUBJECT INDEX

	PAGE
No Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	2
Specification of Errors to be Urged	3
Reason for Granting the Writ	4
Conclusion	11

Cases Cited

Boykin v. Huff, 121 F. 2d 865, 873 (Ct. App. D. C. 1941)	4
Casalduc v. Diaz, 117 F. 2d 915 (1 Cir. 1941)	6
Crump v. Hill, 104 F. 2d 36 (5 Cir.)	6
Federal Deposit Ins. v. Congregation, 159 F. 2d 166 (2 Cir.)	6
Hill v. Hawes, 320 U. S. 520, 524	10
Jarowski v. Hamburg, 186 F. 2d 332 (2. Cir.)	5
Mondakota Gas Co. v. Montana Dakota Utilities Co., 194 F. 2d 705 (9 Cir. 1952)	10
Mutual Life Ins. Co. v. Phinney, 178 U. S. 327, 337	5

PAGE

Oddo v. United States, 171 F. 2d 854, 855 (2 Cir. 1949) 4

Reynolds v. Imlay, 118 F. 2d 53 (Ct. App. D. C.) 7

Turkett v. United, 76 F. Supp. 769 (D. C., N. D., N. Y. 1948) 10

United Drug Co. v. Helvering, 108 F. 2d 637 (2 Cir. 1940) 5

U. S. v. Todar, 41 F. 2d 146, 147 (7 Cir.) 10

Wallace v. United States, 174 F. 2d 112, 114 (8 Cir. 1949) 4

Williams v. United States, 188 F. 2d 41, 42 (Ct. App. D. C. 1951) 5

Statutes and Other Authorities Cited

28 U. S. C. Sec. 1254 (1) 1

28 U. S. C. Sec. 1917 ..... 2, 9

28 U. S. C.
F. R. C. P. 5 (e) 7

F. R. C. P. 6 (b) (2) 7

F. R. C. P. 60 (b) 3, 8

F. R. C. P. 73 (a) 8

4 Fed. Rules Service p. 818 7

Bouvier's Law Dictionary 6

53 Corpus Juris 618 9

36 Corpus Juris Secundum 752-757 9

INDEX TO APPENDIX

	PAGE
Notice of Appeal dated May 20, 1954	1a
Affidavit of Harry A. Smith dated May 25, 1954	2a
Order Nunc Pro Tunc dated May 27, 1954	4a
Motion to Dismiss dated June 3, 1954	5a
Decision dated June 10, 1954	6a

Supreme Court of the United States

OCTOBER TERM

No. .....

ANTHONY J. PARISSI,

Petitioner,

v.

TELECHRON, INC., and GENERAL ELECTRIC COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case.

No Opinion Below

The decision of the Court of Appeals was entered without opinion.

Jurisdiction

The decision of the Court of Appeals was entered on June 10, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254 (1).

Questions Presented

1. Is it proper to dismiss an appeal where a notice of appeal, and appeal bond, were timely mailed and received by the Clerk, into his custody, but the $5.00 Clerk's fee was untimely received?

   (a) Where the Clerk has a choice to file before receiving such fee, can the question of such fee be jurisdictional?

   (b) Where the Clerk exercises his choice and does not file the timely received appeal papers, until he receives such fee, is a nunc pro tunc order proper to require timely filing, that is, as of the day the appeal papers were put into the Clerk's custody?

Statute Involved

United States Code, Title 28:

"§ 1917. District courts; fee on filing notice of or petition for appeal.

Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari $5 shall be paid to the clerk of the district court, by the appellant or petitioner."

Statement

On April 22, 1954, a judgment was entered in the District Court for the Northern District of New York, in Albany, N. Y., holding Petitioner's patents invalid, and dismissing his claim for unjust enrichment based on breach of confidence by Respondents.*

---

* The record before the Court of Appeals is set forth herein as an Appendix to this Petition.

On May 20, 1954, the necessary notice of appeal, and appeal bond, were sent, registered mail, to the Clerk in Utica, N. Y., but the $5 filing fee was inadvertently omitted. The next day the Clerk wrote Petitioner's counsel an over-the-week-end letter (without other notice, oral or otherwise) stating he would withhold filing until he obtained the $5 fee. Such fee was immediately sent by return mail (Appendix-Affidavit).

Fearing that the Clerk might not choose to file the notice of appeal on time, an order nunc pro tunc was obtained on affidavit, signed by the District Judge having jurisdiction of the case—not for any enlargement of time beyond the 30-day appeal period for Petitioner to take action to prepare and submit his notice of appeal—but to have the Clerk act to accord the notice of appeal a filing date as of the time it was actually received; and the Clerk did so (Appendix-Order).

On June 3, 1954, Respondents moved to dismiss the appeal (Appendix-Motion).

The Court of Appeals after hearing arguments on the motion, suggested that Petitioner's counsel should have several days time to present a memorandum, and further suggested that, among other arguments, Petitioner should move under Rule 60(b). The memorandum was so presented, and the Court dismissed the appeal forthwith—without any opinion.

Specification of Errors to be Urged

The Court of Appeals erred:

1. In dismissing the appeal:

2. In dismissing the appeal without opinion and failing to indicate the basis for its decision:

3. In not denying Respondents' motion to dismiss the appeal;

4. In deciding in conflict with decisions in its own and other circuits.

Reason for Granting the Writ

1. The decision of the court below in the instant case is directly in conflict in principle and with the decisions of the following cases:

> *Oddo* v. *United States*, 171 F. 2nd 854 (2 Cir. 1949).

Where Appellant's notice of appeal was timely received by the Clerk on March 29, 1948, who did not file it until April 7, 1948 (after appeal period had expired) because the $5 filing fee did not arrive until that date. The Court in assuming jurisdiction held (p. 855):

> "The fact that the notice of appeal was unaccompanied by the filing fee does not in our opinion impair its validity. It is true that we do not find in the Criminal rules the equivalent of Civil Rule 73(a) which provides that the failure of appellants to take further steps after filing notice of appeal does not affect the validity of the appeal;"

In *Wallace* v. *United States*, 174 F. 2nd 112, 114 (8 Cir. 1949), the Clerk timely received the notice of appeal, but not the filing fee, but the court assumed jurisdiction.

> *Poykin* v. *Huff*, 121 F. 2nd 865, 873 (Ct. App. D. C. 1941).

Where the notice of appeal was timely submitted to the Judge but no fee at all was paid—the Court held:

"nor was the filing ineffective, in these circumstances, because appellant did not tender the five-dollar filing fee as required by the statute and rules".

Williams v. *United States*, 188 F. 2nd 41, 42 (Ct. App. D. C. 1951).

Where the notice of appeal was prepared in time but not received by the Clerk in time, because not delivered promptly—the court held:

"In such a situation, therefore, the filing was not ineffective because appellant did not tender the filing fee."

Mutual Life Ins. Co. v. *Phinney*, 178 U. S. 327, 337.

Where the Clerk timely received but omitted to file, this court held—

"* * * that the party seeking a review must act in time and must make a substantial compliance with all that the statute prescribes, at the same time we have been equally careful to hold that no mere technical omission which did not prejudice the rights of defendant in error should be made available to oust the appellate court of jurisdiction. We are clear that upon the showing made, the Court of Appeals had jurisdiction, and should have proceeded to dispose of the case upon its merits".

The decision of the court below is believed to be erroneous, and the conflicting decisions above are correct. In further support of Petitioner's contention, note the conflict with the following decisions:

United Drug Co. v. *Helvering* case, 108 F. 2nd 637 (2 Cir. 1940), page 638 "something must be done to indicate an intent to review". See also *Jarowski* v. *Hamburg*, 186 F. 332 (2 Cir.).

Crump v. *Hill*, 104 F. 2nd 36 (5 Cir.) that the filing of a Notice of Appeal after the required time could not divest the Circuit Court of Appeals of jurisdiction established by proceedings within the time, equivalent to filing; and on page 38 the Court says:

> "It is true enough that the starting of an appeal within the time fixed is jurisdictional and that good practice requires conformity to the formal requirements of the Rule. But it would we think be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights."

Federal Deposit Ins. v. *Congregation*, 159 F. 2nd 166 (2 Cir.):

> "The situation is one which demands some ready means of ascertaining the moment when occurs this 'crux of taking an appeal'. The least requirement, which will be tolerable, is that some paper shall be accessible in the records of a court upon which both judges and parties can rely."

Bouvier's Law Dictionary states:

> "Filing a paper * * * consists in placing it in the custody of the proper official * * *. In the sense of a statute requiring the filing of a paper or document, it is filed when delivered to and received by the proper officer to be kept on file."

Casalduc v. *Diaz*, 117 F. 2nd 915 (1 Cir. 1941):

> "'Filing' means delivery of the paper into the actual custody of the proper officer. The Washington, 2 Cir., 16 F. 2nd 206, 208."

4 Federal Rules Service, p. 818:

"'Filing' of notice of appeal means delivery into the actual custody of the clerk or judge within the time prescribed by statute,"

Reynolds v. *Imlay*, 118 F. 2nd 53 (Ct. App. D. C.):

"If the Court finds the notice was duly and timely offered for filing, it may exercise its power to make the record conform to the truth (Rule 75h)."

It seems almost impossible that a situation such as the present one could occur in large cities, or where the Clerk's office is in the same city where attorneys are practicing. Papers are offered and the fee immediately demanded and paid. There is not much chance for inadvertence, mistake or neglect to pay it; but those chances, when the clerk's office, as here, is in a distant city, as Utica is distant from Albany, are considerably increased.

Under Rule 5(e) of the Fed. Rules of Civil Procedure:

"• • • The Judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the Clerk."

Petitioner was not inclined to bother the District Judge in Albany with filing his Notice of Appeal. But if he had, and had failed to pay the Judge a $5 fee, it would seem, nevertheless, that under the above Rule, the Notice of Appeal would have been considered properly filed.

Under Rule 6(b) (2), F. R. C. P., there would seem to be room to act as Petitioner did:

"Upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect".

Of course, this comes under "Enlargement" and excludes that portion of Rule 73(a). But Petitioner was not acting under this latter Rule nor even seeking "Enlargement" by his nunc pro tunc order as heretofore explained. On the contrary, Petitioner sought to validate the appeal already taken by timely delivery of his appeal papers into the actual custody of the Clerk. Rule 73(a) also states:

> "A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, * * *."

It was suggested by the court below at the hearing that Rule 60(b) be invoked, and there would seem, also, to be room for Petitioner to act under this Rule. Section (a) states that—

> "Clerical mistakes * * * arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party * * *. During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court."

And Section (b) states—

> "* * * the court may relieve a party or legal representative from final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, * * *, or excusable neglect; * * * or (6) any other reason justifying relief from the operation of the judgment."

It is stated in 28 U. S. C. Sec. 1917 that—

> "Upon the filing of * * * an appeal * * * $5.00 sha be paid to the Clerk of the District Court, by t Appellant * * *."

This section does not imply that the fee must be pre paid, or paid in advance, or that payment of the fee is condition precedent that will defeat jurisdiction. It coul just as well be, under such extenuating circumstances as here, that the payment of the fee is a condition subsequent without jurisdictional effect on the original filing.

2. The question is of further importance besides the clearing of the conflict. While substantial rights of Petitioner are involved and should be resolved, many other persons or future litigants, apart from the actual litigants herein, will be affected by it.

It is clear that the clerk has a choice—to formally file an appeal, with or without the $5 fee.

53 Corpus Juris 618:

> "However, there is authority that he (clerk) may record the instrument on his own responsibility; and, if he does admit the instrument to record without payment of the fee, the record is not thereby invalidated. * * * and when the clerk receives and retains the instrument in his official custody, the recording is not invalidated because the fees were not prepaid."

See also 36 C. J. S. 752-7 (Filed and Fil..).

Where the clerk has a choice or discretion to formally file or not, as he sees fit, without the fee, or with a late fee, where the papers were timely received by him into his custody—the question of the fee cannot affect the jurisdiction: otherwise, the clerk would have arbitrary power, even to the extent of defeating appellate jurisdiction.

Such cases as *Mondakota Gas Co.* v. *Montana Dakota Utilities Co.*, 194 F. 2nd 705 (9 Cir. 1952) and *Turkett* v. *United*, 76 F. Supp. 769 (N. D. N. Y. 1948), where failure to pay the $5 fee was held to be fatal, also clearly imply that the Clerk has a choice. These two cases otherwise differ from the instant case in that no attempt was made to prevent a late filing while the Court still had jurisdiction and the term had not expired, by an order nunc pro tunc.

3. The order nunc pro tunc in the instant case was perfectly proper. No attempt was thereby made to permit Petitioner to take any action by way of preparing and submitting appeal papers after the lapse of the 30-day period. Such action had already been taken. The intent to appeal was clear. Respondents' rights had not been prejudiced. Petitioner's rights, following over 20 days of trial, and a 2500 page record, are substantial, and in jeopardy, as will be the rights of future litigants similarly situated.

Hill v. *Hawes*, 320 U. S. 520, 524.

The discretion of the trial judge was upheld in vacating the former judgment and entering a new judgment merely to extend the time of appeal. This court said:

> "The term had not expired and the judgment was still within the control of the trial judge for such action as was in the interest of justice to a party to the cause."

U. S. v. *Todar*, 41 F. 2d 146, 147 (7 C. C. A.) regarding nunc pro tunc orders, which states:

> "Respecting the first contention, it seems clear that to confer jurisdiction of an appeal it must have been applied for in the court which gave the judgment, within three months of its rendition. Title 28 sec.

230, U. S. Code (28 U. S. C. A. sec. 230), and many federal decisions.

"After the entry of these judgments on August 22, 1928, the record discloses no further action respecting the appeal until the order of the District Court of March 30, 1929, allowing appellant an appeal in each case nunc pro tunc as of November 19, 1928, which last date is within 3 months after the entry of the judgments."

CONCLUSION

For the foregoing reason, this petition for a writ of certiorari should be granted; or, to save the time of this Court, the decision of the lower Court vacated, and the appeal heard on the merits.

CHARLES P. BAUER,
Counsel for Petitioner,
233 Broadway,
New York, N. Y.

Of Counsel:

HARRY A. SMITH and
CHARLES H. ANDROS,
90 State Street,
Albany, New York.

Notice of Appeal, dated May 20, 1954.

In the

DISTRICT COURT OF THE UNITED STATES,

Northern District of New York.

Civil Action No. 3831.

Telechron, Inc., and General Electric Company,

Plaintiffs,

v.

Anthony J. Parissi,

Defendant.

Notice of Appeal

Notice is hereby given that defendant, Anthony J. Parissi, hereby appeals to the United States Court of Appeals for the Second Circuit, from all parts of the Final Judgment entered in this action on April 22, 1954.

Andros and Smith,
By Harry A. Smith,
Attorneys for Defendant,
90 State Street,
Albany, New York.

Dated: May 20, 1954.

To:

Whalen, McNamee, Creble and Nichols,
75 State Street,
Albany, New York.

Affidavit of Harry A. Smith, dated May 25, 1954.

In the

DISTRICT COURT OF THE UNITED STATES,

Northern District of New York.

Civil Action No. 3831

Telechron, Inc., and General Electric Company,

Plaintiffs,

v.

Anthony J. Parissi,

Defendant.

State of New York }
County of Albany } ss.:

Affidavit

Harry A. Smith, being first duly sworn, deposes and says:

That he is a member of the firm of Andros and Smith, of counsel for Anthony J. Parissi, defendant, in the above entitled action.

That on April 22nd, 1954, a judgment was entered in the District Court in favor of plaintiffs herein and from which defendant decided to appeal in accordance with Rule 73 of the Federal Rules of Civil Procedure which apparently allows thirty (30) days from the entry of judgment.

That on May 20th, 1954, he prepared a proper Notice of Appeal and, with an appeal bond in the sum of $250.00 as required attached thereto, sent the same to the Clerk's

Affidavit of Harry A. Smith, dated May 25, 1954.

Office in Utica, by registered mail, and the same was received by the Clerk the following day, namely, May 21st, one day before the expiration of the appeal date. However, your deponent inadvertently failed to enclose a check for $5.00 as a filing fee. On that day, May 21st, which was on Friday, the Clerk wrote a letter addressed to deponent stating that he would not file the Notice of Appeal until a check for $5.00 was received. Deponent did not receive this letter until Monday, May 24th, and immediately sent such check by return mail. The clerk was also immediately notified by telephone and his instructions were to refer the same to the Judge of this Court.

That deponent, on the day the Notice of Appeal was sent by registered mail to the Clerk's Office, namely May 20th, 1954, had already notified counsel for plaintiffs that a Notice of Appeal was sent to the Clerk and arranged for a conference in New York City to determine whether a stipulation as to the contents of the record to be printed could be agreed upon.

That unless the Court orders that the Clerk now file the Notice of Appeal as of the time it was received by registered mail, namely, May 21st, 1954, it is feared that defendant may be foreclosed from proceeding with his appeal.

That, therefore, an order in effect permitting filing the Notice of Appeal nunc pro tunc is being submitted herewith.

Respectfully submitted,

HARRY A. SMITH.

(L. S.)

Subscribed and sworn to before me
this 25th day of May, 1954.

CAROLYN D. FLINN,
Notary Public.

Order Nunc Pro Tunc, dated May 27, 1954.

IN THE

DISTRICT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF NEW YORK.

CIVIL ACTION NO. 3831

TELECHRON, INC., and GENERAL ELECTRIC COMPANY,

Plaintiffs,

v.

ANTHONY J. PARISSI,

Defendant.

ORDER.

On the annexed affidavit of Harry A. Smith, of counsel for defendant, it is hereby ordered that the Notice of Appeal in this action (from the judgment entered on April 22, 1954) received by the Clerk of the District Court on May 21, 1954, be accorded a filing date as of the day it was received, namely, May 21, 1954.

Dated: May 27, 1954, Albany, N. Y.

/s/ JAMES T. FOLEY,
United States District Judge.

Motion to Dismiss, dated June 3, 1954.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 23120.

TELECHRON, INC. and GENERAL ELECTRIC COMPANY,

Plaintiffs-Appellees,

against

ANTHONY J. PARISSI,

Defendant-Appellant.

MOTION TO DISMISS

Appellees move this Court to dismiss this appeal on the ground of lack of jurisdiction because the notice of appeal was not filed within 30 days from the entry of the judgment appealed from, as required by law.

WHALEN, MCNAMEE, CREBLE & NICHOLS

By CHARLES E. NICHOLS Member of
Firm 75 State Street, Albany 1,
New York
Attorneys for Appellees.

Of Counsel:

CHARLES H. WALKER,
Fish, Richardson & Neave,
20 Exchange Place,
New York 5, New York.

Dated: June 3, 1954.

Decision dated June 10, 1954.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit held at the United States Court House, in the City of New York, on the 10th day of June, one thousand nine hundred and fifty-four.

Present: HON. HARRIE B. CHASE,
Chief Judge
HON. JEROME N. FRANK
HON. CARROLL C. HINCKS
Circuit Judges.

TELECHRON, INC. and GENERAL ELECTRIC COMPANY,
Plaintiffs-Appellees,

v.

ANTHONY J. PARISSI,
Defendant-Appellant.

A motion having been made herein by counsel for the appellees to dismiss the appeal for lack of jurisdiction,

Upon consideration thereof, it is

Ordered that said appeal be and it hereby is dismissed.

Further ordered that a mandate issue accordingly.

A. DANIEL FUSARO
Clerk

LIBRARY
SUPREME COURT U.S.

Office - Supreme Court, U
FILED
FEB 1 1955
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 302

ANTHONY J. PARISSI,

Petitioner,

against

TELECHRON, INC., and GENERAL ELECTRIC COMPANY,

Respondents.

BRIEF FOR THE PETITIONER

CHARLES P. BAUER,
Counsel for Petitioner,
233 Broadway,
New York 7, New York.

Of Counsel:
HARRY A. SMITH and
CHARLES H. ANDROS,
90 State Street,
Albany, New York.

SUBJECT INDEX

	PAGE
No Opinion Below	1
Jurisdiction	1
Question Presented	1
Statute Involved	2
Statement	2
Summary of Argument	4
Argument	4
I. "Filing" Means Timely Placing of Papers Into The Custody Of the Clerk Or Other Official Of the Court	4
II. A Nunc Pro Tunc Order Is Proper To Correct The Clerk's Record To Make It Conform To The Facts	8
III. Where The Clerk Has A Choice To Act or Not To Act Under A Statute It Cannot Be Jurisdictional	10
IV. Parissi At Least Should Have Been Accorded Impartial Treatment Under the Law Since There Is No Distinction Between Civil And Criminal Cases Where Both Appellants Must Proceed Under The Same Statute, Namely, U. S. Code, Title 28, Sec. 1917	13
Conclusion	16

Cases Cited

PAGE

American Exch. Nat. Bank v. Colonial, 186 S. W. 361, 363 ..... 11, 12

Boykin v. Huff, 121 F. 2d 865, 873 (Ct. App. D. C. 1941) 14

Casalduc v. Diaz, 117 F. 2d 915 (1 Cir. 1941) 5
Crump v. Hill, 104 F. 2d 36 (5 Cir.) 6

Federal Deposit Ins. v. Congregation, 159 F. 2nd 166 (2 Cir.) 5

Hamilton v. People, 61 Ill. App. 91 12
Hill v. Hawes, 320 U. S. 520, 524 10

Jarowski v. Hamburg, 186 F. 2d 332 (2 Cir.) 5

Mondakota Gas Co. v. Montana Dakota Utilities Co., 194 F. 2d 705 (9 Cir. 1952) 12
Mutual Life Ins. Co. v. Phinney, 178 U. S. 327, 336, 337 ..... 6, 13

Oddo v. United States, 171 F. 2d 854, 855 (2 Cir. 1949), Cert. Den. 337 U. S. 943 (1949) 13
Oil Well Supply Co. v. Wickwire, 52 F. Supp. 921 .. 12

Parissi v. G. E., 89 U. S. P. Q. 134; 97 Fed. Supp. 333 15
Parissi v Foley, 203 F. 2nd 454 (C. A. 2) 15

Reynolds v. Imlay, 118 F. 2d 53 (Ct. App. D. C.) .. 7

Telechron and G. E. v. Parissi, 89 U. S. P. Q. 136, 97 Fed. Supp. 355 15
Telechron and G. E. v. Parissi, 197 F. 2d 757 (C. A. 2) 15
Turkett v. United States, 76 F. Supp. 769 (D. C., N. D., N. Y. 1948) 12

PAGE

United Drug Co. v. Helvering, 108 F. 2d 637 (2 Cir. 1940) 5
U. S. v. Todar, 41 F. 2d 146, 147 (7 Cir.) 10

Wallace v. United States, 174 F. 2d 112, 114 (8 Cir. 1949) 14
Williams v. United States, 188 F. 2d 41, 42 (Ct. App. D. C. 1951) 14

STATUTES AND OTHER AUTHORITIES CITED

28 U. S. C. Sec. 1254 (1) 1
28 U. S. C. Sec. 1447 (d) 15
28 U. S. C. Sec. 1914 (c) 12
28 U. S. C. Sec. 1917 .....2, 4, 10, 12, 13
F. R. C. P. 5 (e) 7
F. R. C. P. 6 (b) 8
F. R. C. P. 60 9
F. R. C. P. 73 (a) 9, 15
F. R. Criminal P. 37 15
4 Fed. Rules Service p. 818 5
Bouvier's Law Dictionary 5
53 Corpus Juris 618 11
36 Corpus Juris Secundum 752-757 11

In the

Supreme Court of the United States

October Term, 1954

No. 302

Anthony J. Parissi,

Petitioner,

against

Telechron, Inc., and General Electric Company,

Respondents.

BRIEF FOR THE PETITIONER

No Opinion Below

The decision of the Court of Appeals was entered without opinion (R. 10).

Jurisdiction

The decision of the Court of Appeals was entered on June 10, 1954. The petition was filed August 24, 1954, and was granted October 25, 1954. The jurisdiction of this Court rests on 28 U. S. C. sec. 1254 (1).

Question Presented

Is it proper to dismiss an appeal where a Notice of Appeal, and $250.00 Appeal Bond, were timely mailed and timely received by the District Court Clerk into his custody

in the Clerk's Office, but the $5.00 Clerk's fee was untimely received?

(a) Where such Notice and Bond are so received, is this not a timely filing?

(b) Where the Clerk has a choice either to withhold or to note the date of the receipt of such Notice and Bond on such papers, or in his docket, can the question of late payment of such $5.00 fee defeat jurisdiction?

(c) Where the Clerk exercises his choice and does not note on such papers, or in his docket, the actual date that he timely received the same, but the date he received the late $5.00 fee, is not a nunc pro tunc order proper to cause the Clerk to accord applicant a filing date as of the time the necessary papers were actually received?

Statute Involved

United States Code, Title 28:

> "§ 1917. *District courts; fee on filing notice of or petition for appeal*: Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari $5.00 shall be paid to the clerk of the district court, by the appellant or petitioner."

Statement

On April 22, 1954, a judgment (R. 3) was entered in the District Court for the Northern District of New York, in Albany, N. Y., dismissing Parissi's claim for unjust enrichment based on breach of confidence by Respondents,

and holding his patents invalid as the result of an action for declaratory judgment filed by Telechron, Inc., and General Electric Company.

On May 20, 1954, the necessary notice of appeal and appeal bond (R. 6) were sent, registered mail, to the Clerk of the District Court in Utica, N. Y., for filing, but the $5.00 Clerk's fee was inadvertently omitted. The next day the Clerk wrote Petitioner's counsel an over-the-week-end letter (R. 9) (without other notice, oral or otherwise) stating he would withhold filing until he obtained the $5.00 fee. Such fee was immediately sent by return mail (R. 9).

Fearing that the Clerk, for some reason or other, might not choose to accord the notice of appeal a filing date as of the day he received it, an order nunc pro tunc (R. 7) was obtained on affidavit, signed by the District Judge having jurisdiction of the case—not for any enlargement of time beyond the 30-day appeal period for Petitioner to take action to prepare and submit his notice of appeal and bond—but to have the Clerk act to accord the notice of appeal a filing date as of the time it was actually received into his custody; and the Clerk did so (R. 1). There was no necessity or question of extending the time. All the proceedings were had.

On June 3, 1954, Respondents moved to dismiss the appeal (R. 10).

The Court of Appeals, after hearing arguments on the motion, suggested that Petitioner's counsel should have several days' time to present a memorandum, and further suggested that, among other arguments, Petitioner should move, for example, under Rule 60(b). The memorandum was so presented, but the Court dismissed the appeal forthwith—without any opinion (R. 10).

Summary of Argument

A notice of appeal is just as truly "filed" as much as it ever will be when it is timely placed in the custody of the Clerk in the District Court, regardless of whether he untimely dockets it. A nunc pro tunc order under such circumstances of untimely docketing is proper to cure the clerk's act of omission properly to perform his official duty to make him accord such papers a filing date as of the day he received them. Late payment of a $5.00 Clerk's fee, where everything else necessary to take an appeal has timely been done regarding appeal papers, cannot go to the jurisdiction where the clerk has a choice to record the filing of such papers or not, when he pleases, since this might arbitrarily defeat appellate jurisdiction. There is no distinction in this respect, that is, late payment of a $5.00 fee, between criminal and civil cases where the appellants must proceed under the same statute, namely, U. S. Code, Title 28, sec. 1917. A gross injustice would result if such a slight technical error, or mere procedural irregularity, as a late payment of a $5.00 fee, were to deprive Petitioner of appellate review of the merits of his case.

ARGUMENT

I

"Filing" means timely placing of papers into the custody of the Clerk or other official of the Court.

It goes without saying, that when an appellant does nothing at all toward perfecting an appeal "on time", or files his papers "out of time", the "bars are down" and the appellate court is deprived of jurisdiction. There are many cases that make this only too clear. But this case,

and those cited in support of it, do not fall in this category. Parissi timely filed all his appeal papers.

Bouvier's Law Dictionary states:

> "Filling a paper * * * consists in placing it in the custody of the proper official * * *. In the sense of a statute requiring the filing of a paper or document, it is filed when delivered to and received by the proper officer to be kept on file."

4 Federal Rules Service, p. 818:

> "'Filing' of notice of appeal means delivery into the actual custody of the clerk or judge within the time prescribed by statute."

Casalduc v. Diaz, 117 F. 2nd 915 (1 Cir. 1941):

> "'Filing' means delivery of the paper into the actual custody of the proper officer. The Washington, 2 Cir., 16 F. 2nd 206, 208."

United Drug Co. v. *Helvering*, 108 F. 2nd 637 (2 Cir. 1940), p. 638:

> "* * * something must be done in the proper Court to indicate an intent to review" Rule 73(a). [See also *Jarowski* v. *Hamburg*, 186 F. 332 (2 Cir.) cited herein.]

Federal Deposit Ins. v. *Congregation*, 159 F. 2nd 166 (2 Cir.):

> "The situation is one which demands some ready means of ascertaining the moment when occurs this 'crux of taking an appeal'. The least requirement, which will be tolerable, is that some paper shall be accessible in the records of a court upon which both judges and parties can rely."

In *Crump* v. *Hill,* 104 F. 2nd 36 (5 Cir.), it even was held that the filing of a Notice of Appeal after the required time could not divest the Circuit Court of Appeals of jurisdiction established by proceeding within the time, equivalent to filing and a substantial compliance with the rule which conferred jurisdiction; and on page 38 the Court says:

> "It is true enough that the starting of an appeal within the time fixed is jurisdictional and that good practice requires conformity to the formal requirements of the Rule. But it would we think be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a traversy upon justice, to hold that the extremely simple procedure required by the Rule is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights."

Mutual Life Ins. Co. v. *Phinney,* 178 U. S. 327, 336, 337: Where the Clerk timely received but omitted to record the filing, this court held:

> "In this case there is no question of time. All the proceedings, with a view of taking the case to the appellate Court, were had within less than three months from the date of judgment. * * *"

> "* * * that the party seeking a review must act in time and must make a substantial compliance with all that the statute prescribes, at the same time we have been equally careful to hold that no mere technical omission which did not prejudice the rights of defendant in error should be made available to oust the appellate court of jurisdiction. We are clear that upon the showing made, the Court of Appeals had jurisdiction and should have proceeded to dispose of the case upon its merits."

Reynolds v. *Imlay*, 118 F. 2nd 53 (Ct. App. D. C.):

> "If the Court finds the notice was duly and timely offered for filing, it may exercise its power to make the record conform to the truth (Rule 75th)."

It seems almost impossible that a situation such as the present one could occur in large cities, or where the Clerk's office is in the same city where attorneys are practicing. Papers are offered and the fee immediately demanded and paid. There is not much chance for inadvertence, mistake or neglect to pay it; but those chances, when the Clerk's office, as here, is in a distant city, as Utica is distant from Albany, are considerably increased when mailing such papers must be relied upon. In outlying districts such as ours, attorneys conventionally consult and rely on the local rules regarding filing of papers. There was nothing in the local rules which mentioned a $5.00 Clerk's fee for appeals in civil cases. However, since the happenings of the instant case, new rules now have been printed for the Northern District of New York, effective September 1, 1954, and Rule 5 now calls for payment of all fees in advance.

Under *Rule 5(c)* of the *Fed. Rules of Civil Procedure*:

> "• • • The Judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the Clerk."

This shows that filing is not a mere question of a docket entry or a notation on the papers that the same have been filed, but one of getting the papers into the custody of the Court through the Clerk or Judge. Docketing or noting the filing date on papers is merely evidence that they have been filed.

Petitioner was not inclined to bother or seek out the District Judge in Albany with filing his Notice of Appeal.

But if he had, and had failed to pay the Judge a $5.00 fee, it would seem, nevertheless, that under the above Rule, the Notice of Appeal would have been considered properly filed.

II

A nunc pro tunc order is proper to correct the Clerk's record to make it conform to the facts.

The Clerk's failure to evidence the filing date on the timely received notice of appeal and bond, or to docket the same, as of the day he received it was an act of omission of his official duty. Obviously, if the docket entry showed a receipt of the appeal papers "out of time", when in fact they were received "in time", it would be misleading and cause any appellate Court, of its own motion, to refuse to take jurisdiction. Parissi's nunc pro tunc order (R. 7) sought merely to correct the record, or the Clerk's "omission."

The order nunc pro tunc in the instant case was perfectly proper. No attempt was thereby made to permit Petitioner to take any action by way of preparing and submitting appeal papers after the lapse of the 30-day appeal period; or to anticipate the actual time of presenting the appeal. Such action had already been taken. The intent to appeal was clear. Respondents' rights had not been prejudiced. They had been given prior notice of Parissi's appeal (R. 8.)

Under Rule 6(b), F. R. Civil P. states:

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion * * * (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable

> neglect; but it may not extend the time for taking any action under Rules * * * 73 (a) * * *, except to the extent and under the conditions stated in them."

Of course, this comes under "Enlargement" and excludes that portion of Rule 73(a). But Petitioner was not acting under this latter Rule to seek "Enlargement" by his nunc pro tunc order as heretofore explained. On the contrary, Petitioner sought to insure the validity of the appeal already taken by timely delivery of his appeal papers into the actual custody of the Clerk and make him accord his papers a proper rather than an improper date —to keep the record straight. Rule 73(a) also states:

> "A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal. * * *"

It was suggested by the Court below at the hearing that Rule 60 might be invoked. Certainly, the procedure by nunc pro tunc order comes within this Rule. Section (a) of the Rule states that:

> "Clerical mistakes * * * arising from oversight or *omission* may be corrected by the court at any time of its own initiative or on the motion of any party * * *. During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court." (Italics ours.)

And Section (b) of the Rule states that:

> "* * * the court may relieve a party or legal representative from final judgment, order or proceeding for the following reason: (1) mistake, inadvert-

> ance, * * *, or excusable neglect; * * * or (6) any other reason justifying relief from the operating of the judgment."

In *Hill* v. *Hawes*, 320 U. S. 520, 524, the discretion of the trial judge was upheld in vacating the former judgment and entering a new judgment merely to extend the time of appeal. This Court said:

> "The term had not expired and the judgment was still within the control of the trial judge for such action as was in the interest of justice to a party to the cause."

U. S. v. *Todar*, 41 F. 2d 146, 147 (7 C. C. A.) regarding a nunc pro tunc order, states:

> "Respecting the first contention, it seems clear that to confer jurisdiction of an appeal it must have been applied for in the court which gave the judgment, within three months of its rendition. Title 28 sec. 230, U. S. Code (28 U. S. C. A. sec. 230) citing many other Federal decisions. * * * After the entry of these judgments on August 22, 1928, the record discloses no further action respecting the appeal until the order of the District Court of March 30, 1929, allowing appellant an appeal in each case nunc pro tunc as of November 19, 1928, which last date is within 3 months after the entry of the judgments."

III

Where the Clerk has a choice to act or not to act under a statute it cannot be jurisdictional.

It is stated, in part, in the statute, 28 U. S. C. Sec. 1917, that—

> "Upon the filing of * * * an appeal * * * $5.00 shall be paid to the Clerk of the District Court, by the Appellant * * *."

This section does not state or even imply that the fee *must* be prepaid, or paid in advance, or that payment of the fee is a condition precedent that will defeat jurisdiction. It is more logical and reasonable, under such extenuating circumstances as those here involved, that the payment of the fee, if anything, is a condition subsequent, without jurisdictional effect on the original filing. "Upon the filing", or when the Clerk files, he is entitled to his fee.

It is clear that the Clerk has a choice—to formally file, or record the filing, of an appeal, with or without the $5.00 fee, or to withhold formal filing, i. e., endorsing the filing date on the papers or in the docket.

53 Corpus Juris 618, makes this quite clear:

> "However, there is authority that he (clerk) may record the instrument on his own responsibility; and, if he does admit the instrument to record without payment of the fee, the record is not thereby invalidated. * * * and when the clerk receives and retains the instrument in his official custody, the recording is not invalidated because the fees were not prepaid."

See also *36 C. J. S. 752-7* (Filed and Filing).

Where the clerk has a choice or discretion to formally file or not, as he sees fit, without the fee, or with a late fee, where the papers were timely received by him into his custody—the question of the fee cannot affect the jurisdiction. Otherwise, the Clerk would have arbitrary power, even to the extent of defeating appellate jurisdiction.

American Exch. Nat. Bank of Dallas, et al. v. *Colonial Trust Co.*, 186 S. W. 361, 363.

> "But when the clerk receives and retains the instrument in his official custody it is filed within the

> meaning of the law. It is not intended by the article (statute) to clothe the clerk with the power of making or defeating rights. • • •"

The *American Exchange* case is cited and distinguished in *Oil Well Supply Co.* v. *Wickwire*, 52 F. Supp. 921, as is also the case of *Hamilton* v. *People*, 61 Ill. App. 91. "It was not the intent of the legislature to require county officials to demand fees in advance and be liable for all fees earned whether collected or not." Nor that such official "should refuse to perform an official duty except upon payment of the fee therefor."

Such cases as *Oil Well Supply Co.* have to do with statutes which call for "advance payment of fees" as a prerequisite to filing. That is not the situation with the statute here involved. Nor does 28 U. S. Sec. 1917 contain or imply any such language as "advance payment of fees" or its equivalent. But see Sec. 1914(c) of 28 U. S. C. (having to do with original process filing fees of $15.00, and habeas corpus filing fees of $5.00) which in this connection states: "Each district court by rule or standing order may require advance payment of fees." Sec. 1917 does not even contain the equivalent of this language. Yet, after Parissi's sad experience, new rules of the U. S. District Court for the Northern District of New York were published, effective September 1, 1954, and Rule 5 now requires for the first time that *all* fees be "paid in advance."

Such cases as *Mondakota Gas Co.* v. *Montan Dakota Utilities Co.*, 194 F. 2nd 705 (9 Cir. 1952) and *Turkett* v. *United States*, 76 F. Supp. 769 (N D. N. Y. 1948), where failure to pay the $5.00 fee was held to be fatal, also clearly imply that the Clerk has a choice. These two cases otherwise differ from the instant case in that no successful attempt was made to cure the clerk's omission as by an order nunc pro tunc while the Court still had jurisdiction and the term had not expired.

Mutual Life Ins. Co. v. *Phinney*, 178 U. S. 327, 336 (*supra*) states:

> "Is it within the power of a clerk to overrule the action of the judge, and prevent an appeal or writ of error which he has allowed?" * * * Can it be that the omission of a clerk can prevent the jurisdiction from attaching to the appellate court? Obviously not."

IV

Parissi at least should have been accorded impartial treatment under the law since there is no distinction between civil and criminal cases where both appellants must proceed under the same statute, namely, U. S. Code, Title 28, Sec. 1917.

Parissi's case is of a civil nature. It has to do with a claim of unjust enrichment for breach of confidence against respondents for misappropriation of his inventions; as well as a claim against respondents infringement of his patents. The four cases immediately following are criminal cases.

In *Oddo* v. *United States*, 171 F. 2nd 854 (2 Cir. 1949), cert. den. 337 U. S. 943, appellant's notice of appeal was timely received by the Clerk on March 29, 1948, who did not record it until April 7, 1948 (after the appeal period had expired) because the $5.00 filing fee did not arrive until that date. Because this was a substantial compliance the Court assumed jurisdiction and held (p. 855):

> "The fact that the notice of appeal was unaccompanied by the filing fee does not in our opinion impair its validity. It is true that we do not find in the Criminal rules the equivalent of Civil Rule 73(a) which provides that the failure of appellants to take further steps after filing notice of appeal does not affect the validity of the appeal."

In *Wallace* v. *United States*, 174 F. 2nd 112, 114 (8 Cir. 1949), the Clerk timely received the notice of appeal, but not the filing fee, yet the court assumed jurisdiction.

Boykin v. *Huff*, 121 F. 2nd 865, 873 (Ct. App. D. C. 1941), where the notice of appeal was timely submitted to the Judge but no fee at all was paid—the Court held:

> "nor was the filing ineffective, in these circumstances, because appellant did not tender the five-dollar filing fee as required by the statute and rules."

Williams v. *United States*, 188 F. 2nd 41, 42 (Ct. App. D. C. 1951), the notice of appeal was prepared and submitted in time to a United States marshal but was not received by the Clerk in time, because not delivered promptly and the court held:

> "In such a situation, therefore, the filing was not ineffective because appellant did not tender the filing fee."

It is quite obvious that the failure timely to pay the $5.00 fee, or to pay it at all, was not regarded by the Court in each of the above cases as affecting their jurisdiction. They were satisfied that an appeal had been "taken" since the notice to the Clerk was timely. Whether or not the criminal appellants were incarcerated, or represented by counsel, is as much beside the point as the failure timely to pay a $5.00 fee. Such incidents, or the lack of them, did not confer jurisdiction on the appellate court in each case. It was the timely receipt of the notice of appeal or action on the part of the appellants that gave the jurisdiction. If there had otherwise been no jurisdiction, each appellate court would, of its own motion, have refused to take jurisdiction—and that would be the end of it.

Parissi, as a civil appellant in the court below, was entitled to impartial treatment since there is "equal justice

under law". Parissi's position is even stronger in a civil case. F. R. Civil P. 73(a) states:

> "A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, * * *."

F. R. Criminal P. 37 contains nothing equivalent to the quoted language above.

It would hardly seem equitable and just, after several years of litigation, involving two intermediate appeals, a trial lasting about 20 days and covering 2500 or more pages of a transcript of record, comprising issues of unjust enrichment for breach of confidence for misappropriation of his inventions, intermingled with issues of patent validity and infringement of his patents,* if Parissi were now to be denied a hearing by an appellate court on the merits of his case. Parissi should not be deprived of justice because of a late $5.00 clerk's fee, at most a mere procedural

---

* Parissi's path has, from the outset, been strewn and beset with technicalities not of his own making. He commenced his action, lacking diversity of citizenship, in the New York Supreme Court against General Electric Company for unjust enrichment, for misappropriation of his inventions, based on breach of confidence. General Electric Company and Telechron, Inc., by a concerted maneuver, sued Parissi in the Federal Court for a Declaratory Judgment to invalidate his patents and, on petition, removed his unjust enrichment action to the Federal Court. On Parissi's motion, his case was remanded to the State Court. See *Parissi* v. *G. E.*, and, *Telechron and G. E.* v. *Parissi*, 89 U.S.P.Q. 134 and 136, respectively. See also 28 U. S. C. Sec. 1447(d) "An order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise". Despite this, and over Parissi's objections, the State Court issues were tried in the Federal Court, the remand in effect reviewed, but the statute (above) ignored. See *Telechron, Inc. and G. E.* v. *Parissi*, 197 F. 2nd 757 (C. A. 2). Following this, Parissi was denied a jury trial on the unjust enrichment issues removed from the State Court. *Parissi* v. *Foley*, 203 F. 2nd 454 (C. A. 2).

irregularity or slight technical error, especially when his notice of appeal and $250.00 cost bond (which of itself adequately covers such fee) were timely filed with the clerk. Parissi should be heard on appeal on the merits of his case.

CONCLUSION

For the reasons stated it is respectfully submitted that the decision of the lower Court be vacated, and the appeal heard on the merits.

CHARLES P. BAUER,
Counsel for Petitioner,
233 Broadway,
New York 7, New York.

Of Counsel:

HARRY A. SMITH and
CHARLES H. ANDROS,
90 State Street,
Albany, New York.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
SEP 21 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954

No. 302

ANTHONY J. PARISSI,
Petitioner,

v.

TELECHRON, INC., and
GENERAL ELECTRIC COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

CHARLES H. WALKER
Counsel for Respondents
20 Exchange Place
New York 5, New York

Of Counsel

CHARLES E. NICHOLS
75 State Street
Albany 1, New York

HENRY J. ZAPIAN
20 Exchange Place
New York 5, New York

September 20, 1954

INDEX

PAGE

Opinion Below 1

Jurisdiction 1

Questions Presented 2

Statutes Involved 2

Statement 2

Argument 4

I. The Decision of the Court of Appeals Was Correct 4

II. The Decision of the Court of Appeals Is Not in Conflict with Any Decision of this Court or of Any Court of Appeals 11

III. The Decision of the Court of Appeals Does Not Raise Any Issue of Public Importance 19

Conclusion 20

Appendix

28 U. S. C. 2107, 1948 Ed 1a

Notice of Entry of Judgment of April 22, 1954, and Affidavit of Service 2a

CITATIONS

PAGE

CASES:

Anno v. *United States*, 113 F. Supp. 673 (Ct. Cl. 1953) 9

Boykin v. *Huff*, 121 F. 2d 865 (App. D. C. 1941) ... 14
Brandies v. *Cochran*, 105 U. S. 261 (1881) 17

Casalduc v. *Diaz*, 117 F. 2d 915, 4 Fed. Rules Serv. 818 (1 Cir. 1941), cert. denied 314 U. S. 639 (1941) 15
Credit Co. v. *Ark. Central Railway*, 128 U. S. 258 (1888) 10
Crow v. *United States*, 203 F. 2d 670 (9 Cir. 1953) 14
Crump v. *Hill*, 104 F. 2d 36 (5 Cir. 1939) 15

Deena Products Co. v. *United Brick & Clay Workers*, 195 F. 2d 612 (6 Cir. 1952), cert. denied 344 U. S. 822 (1952) 5
Donaldson v. *Baltimore Acceptance Corp.*, 38 F. 2d 215 (3 Cir. 1930) 17

Federal Deposit Ins. Corp. v. *Congregation Poiley Tzedeck*, 159 F. 2d 163 (2 Cir. 1946) 18

George v. *Victor Co.*, 293 U. S. 377 (1934) 5

Hill v. *Hawes*, 320 U. S. 520 (1944) 12, 13
Howard v. *Local 74*, 208 F. 2d 930 (7 Cir. 1953) ... 5, 15
Huff v. *United States*, 192 F. 2d 911, 913 (5 Cir. 1951), cert. denied 342 U. S. 946 (1952) 13

Jarowski v. *Hamburg American Packet Co.*, 186 Fed. 332 (2 Cir. 1911) 18

Mondakota Gas Co. v. *Montana-Dakota Utilities Co.*, 194 F. 2d 705 (9 Cir. 1952), rehearing denied *ibid.*, cert. denied 344 U. S. 827 (1952) ... 5, 6, 8, 11, 15
Morrow v. *Wood*, 126 F. 2d 1021 (1942) 15

PAGE

Mutual Life Ins. Co. v. *Phinney*, 178 U. S. 327 (1900) 12

North Umberland Mining Co. v. *Standard Acc. Ins. Co.*, 193 F. 2d 951 (9 Cir. 1952) 3

Oddo v. *United States*, 171 F. 2nd 854 (2 Cir. 1949), cert. denied 337 U. S. 943 (1949) 14

Oil Well Supply Co. v. *Wickwire*, 52 F. Supp. 921 (E. D. Ill. 1943) 7, 9

Old Nick William Co. v. *U. S.*, 215 U. S. 541 (1910) 11

Ommen v. *Talcott*, 180 Fed. 925 (S. D. N. Y. 1910) 9

Perrin v. *Aluminum Co. of America*, 197 F. 2d 254 (9 Cir. 1952) 10

Principale v. *Ass. Gas & Elec. Co.*, 192 F. 2d 1016 (2 Cir. 1951), cert. denied 343 U. S. 942 (1952) 5

Randolph v. *Randolph*, 198 F. 2d 956 (App. D. C. 1952) 5

Ray v. *Morris*, 170 F. 2d 498 (7 Cir. 1948) 6

Reynolds v. *Imlay*, 118 F. 2d 53 (App. D. C 1941) .. 16

St. Luke's Hospital v. *Melin*, 172 F. 2d 532 (8 Cir. 1949) 5

Sibbach v. *Wilson*, 312 U. S. 1 (1941) 10

Smith v. *Johnston*, 109 F. 2d 152 (9 Cir. 1940) 9

Spengler v. *Hughes Tool Co.*, 169 F. 2d 166 (10 Cir. 1948) 5

Steever v. *Rickman*, 109 U. S. 74 (1883) 9

Turkett v. *United States*, 76 F. Supp. 769 (N. D. N. Y. 1948) 9

United Drug Co. v. *Helvering*, 108 F. 2d 637 (2 Cir. 1940) 17, 18

United States v. *Hall*, 83 F. 2d 94 (1 Cir. 1936) 11

United States v. *Lombardo*, 241 U. S. 73 (1916) ... 6

United States v. *Sherwood*, 312 U. S. 584 (1941) .. 10

United States v. *Todar*, 41 F. 2d 146 (7 Cir. 1930) .. 16

PAGE

Wallace v. *United States*, 174 F. 2d 112 (8 Cir. 1949), cert. denied 337 U. S. 947 (1948) 14
Watson v. *Providence Washington Ins. Co.*, 201 F. 2d 736 (4 Cir. 1953) 5
Williams v. *United States*, 188 F. 2d 41 (App. D. C. 1941) 14
Wisconsin Electric Co. v. *Dumore Co.*, 282 U. S. 813 (1931) 18

Vturbide's Executors v. *United States*, 22 How. (63 U. S.) 290 (1859) 6

STATUTES:

28 U. S. C. § 230, 1925 Ed. 16
28 U. S. C. § 549, 1925 Ed. 10
28 U. S. C. § 1254 (1), 1948 Ed. 1
28 U. S. C. § 1917, 1948 Ed. 2, 8
28 U. S. C. § 2107, 1948 Ed. 2, 13, 14, 1a

FEDERAL RULES:

F. R. C. P. 37 (a) 14
F. R. C. P. 60 (b) 10
F. R. C. P. 73 (a) 5, 13
F. R. C. P. 73 (g) 15
F. R. C. P. 75 (h) 16
F. R. C. P. 75 (j) 4
F. R. C. P. 77 (d) 13

MISCELLANEOUS:

Bouvier's Law Dictionary 6
53 Corpus Juris 618 9

Supreme Court of the United States

OCTOBER TERM, 1954

No. 302

ANTHONY J. PARISSI,

Petitioner,

v.

TELECHRON, INC., and
GENERAL ELECTRIC COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinion Below

The decision of the Court of Appeals dismissing the appeal below was endorsed by the Court (Judges Chase, Frank and Hincks) on the back of the motion papers before them (R. 21), and was without opinion.

Jurisdiction

The formal judgment of dismissal (R. 3, page 6a of the petition) was entered the same day as the decision, June 10, 1954.

Jurisdiction is invoked by the petitioner under 28 U. S. C. § 1254 (1).

Questions Presented

1. Is it not a defect going to the jurisdiction of the Court of Appeals where a party seeking to appeal from a judgment in a civil action fails to pay the prescribed filing fee (28 U. S. C. § 1917) to the District Court Clerk within the required 30-day period for filing a notice of appeal (28 U. S. C. § 2107), and the Clerk, having given prompt notice that the notice of appeal he had received would not be filed until the fee had been received, does not receive the fee or file the notice of appeal until after the expiration of the statutory 30-day period?

2. If the defect is jurisdictional, can it be cured by a subsequent order of the District Court directing the Clerk to accord the notice of appeal a filing date *nunc pro tunc* as of the day it was received by him without the fee, and expressly withheld from filing?

Statutes Involved

The provisions of 28 U. S. C. § 1917 (requiring the payment of a fee of $5.00 upon the filing of a notice of appeal) are set forth in the petition at page 2.

The provisions of 28 U. S. C. § 2107 (limiting the time for filing a notice of appeal to 30 days from the entry of the judgment) are set forth in an appendix to this brief, at page 1a.

Statement

On April 22, 1954, the Clerk of the United States District Court for the Northern District of New York, at Utica, entered a judgment, signed by the trial judge, James T. Foley, D. J., in favor of declaratory plaintiffs in *Telechron, Inc. and General Electric Company* v. *Anthony J.*

Parissi, Civil Action No. 3831 (R. 3, appendix p. 2a)*. Judge Foley's opinion on the merits is reported at 120 F. Supp. 235.

On May 21, 1954, a Friday, (one day before expiration of the statutory 30-day period), the Clerk received a notice of appeal (R. 6, page 1a of the petition) from the judgment of April 22, 1954, and an appeal bond, from Parissi's attorneys, Andros & Smith, of Albany, New York. The same day he wrote a routine letter to Andros & Smith that he was obliged to withhold any filing of the notice of appeal or bond pending his receipt of the statutory filing fee (R. 12).

On May 24, 1954, a Monday, Harry A. Smith, Esq., of Andros & Smith, forwarded the fee (R. 13). The fee was received by the Clerk on May 25, 1954 (three days after the expiration of the statutory period), and the notice of appeal and bond were then filed. The fact of this May 25th filing was entered in the District Court docket (R. 1) and was endorsed by the Clerk on the back of the notice of appeal (R. 8a).

Seeking to cure the defect of this filing out of time, petitioner's counsel, Mr. Smith, on affidavit (R. 10, page 2a of the petition) and without any prior notice to respondents,** obtained from Judge Foley an order, dated May 27, 1954,

---

*Despite the statement at page 2n of the petition that "The record before the Court of Appeals is set forth herein as an Appendix to this Petition", the District Court judgment does not appear in that appendix, although it is a part of that record. Other items which are included in the certified record, but not reproduced in the appendix to the petition, will also be referred to in this brief.

**At page 7 of the petition it is stated that "Under Rule 6(b)(2), F. R. C. P., there would seem to be room to act as Petitioner did" in seeking a *nunc pro tunc* order from Judge Foley. But Rule 6(b) specifically excepts Rule 73(a), relating to the time for appeals. See *infra*, pp. 4n-5n, 10n. Also, Rule 6(b)(2) requires that any application for the enlargement of a time which has already expired shall be made only on motion and after notice to the other parties. A similar *ex parte* procedure was held improper in *North Umberland Mining Co.* v. *Standard Acc. Ins. Co.*, 193 F. 2d 951 (9 Cir. 1952).

directing that Parissi's notice of appeal be accorded a filing date *nunc pro tunc* as of May 21, 1954, the day it had been received, without the filing fee, and expressly withheld from filing, by the Clerk (R. 9, page 4a of the petition).

On May 28, 1954, pursuant to this order, the Clerk made a notation in the District Court docket (R. 1), and in the endorsement on the back of the notice of appeal (R. 8a), changing the recorded filing date of the notice of appeal from May 25, 1954, the actual date of filing, to May 21, 1954, which would have been a timely date.

On June 3, 1954, the Clerk, in compliance with respondent's request under F. R. C. P. 75 (j) (R. 14), certified and transmitted a partial record to the Court of Appeals. On the same day, respondents moved to dismiss the appeal for lack of jurisdiction, the notice of appeal not having been filed within the 30 days allowed by law (R. 18, page 5a of the petition).

The motion to dismiss was argued at the next regular motion day of the Court of Appeals, held June 7, 1954, and on June 10, 1954 the Court dismissed the appeal.

Argument

I. THE DECISION OF THE COURT OF APPEALS WAS CORRECT.

The intent and meaning of 28 U. S. C. § 2107 is clear and unambiguous. Apart from exceptions here not pertinent*, the statute prescribes that "no appeal shall bring

*The action in the District Court was not one in admiralty, nor one involving bankruptcy matters or other proceedings under Title 11. The United States, or an officer or an agent thereof, was not a party. Parissi did not attempt to invoke the exception which permits a District Court to extend the time for filing a notice of appeal up to an additional 30 days "upon a showing of excusable neglect based

any judgment . . . in an action . . . of a civil nature before a Court of Appeals for review unless notice of appeal is filed within thirty days after the entry of such judgment . . .". F. R. C. P. 73(a) is to the same effect.

Consistent with the holding of this Court in *George* v. *Victor Co.*, 293 U. S. 377 (1934) that a Court of Appeals is without jurisdiction where an appeal is not taken within the time prescribed by law, it has been uniformly held that failure to cause a notice of appeal to be filed within the required period, as required by statute, is not a mere procedural irregularity but is a jurisdictional defect depriving the Court of Appeals of any power to review the judgment.

Principale v. *Associated Gas & Elec. Co.*, 192 F. 2d 1016 (2 Cir. 1951), cert. denied 343 U. S. 942 (1952)

Deena Products Co. v. *United Brick & Clay Workers*, 195 F. 2d 612 (6 Cir. 1952), cert. denied 344 U. S. 822 (1952)

Howard v. *Local 74*, 208 F. 2d 930 (7 Cir. 1953)

St. Luke's Hospital v. *Melin*, 172 F. 2d 532 (8 Cir. 1949)

Mondakota Gas Co. v. *Montana-Dakota Utilities Co.*, 194 F. 2d 705 (9 Cir. 1952), rehearing denied, *ibid*, cert. denied 344 U. S. 827 (1952)

---

on failure of a party to learn of the entry of the judgment . . ."; nor could he have successfully done so in view of the obvious prior knowledge of the entry of judgment reflected in his notice of appeal of May 20, 1954—knowledge based upon receipt of a certified copy of the judgment, and ~~of the Clerk's~~ notice of entry, promptly served upon him by respondents' attorneys (R. 28, appendix to this brief, p. 2a). That the time for filing a notice of appeal cannot be extended for any other reason, see e.g. *Howard* v. *Local 74*, 208 F. 2d 930 (7 Cir. 1953), *Watson* v. *Providence-Washington Ins. Co.*, 201 F. 2d 736 (4 Cir. 1953).

Spengler v. *Hughes Tool Co.*, 169 F. 2d 166 (10 Cir. 1948)

Randolph v. *Randolph*, 198 F. 2d 956 (App. D. C. 1952)

Since the Clerk of the District Court did not file Parissi's notice of appeal, or treat it as filed, until May 25, 1954, three days after the statutory period for filing the notice had expired, the Court of Appeals correctly dismissed the appeal.*

Clearly the mere receipt and retention of the notice of appeal by the Clerk before the expiration of the statutory period did not constitute a filing within the meaning of the statute. *Mondakota Gas Co.* v. *Montana-Dakota Utilities Co.*, 194 F. 2d 705 (9 Cir. 1952), rehearing denied, *ibid*, cert. denied 344 U. S. 827 (1952). For, as stated in *United States* v. *Lombardo*, 241 U. S. 73, 76 (1916), "A paper is filed when it is delivered to the proper official and by him received and filed (citing Bouvier's Law Dictionary and other authority)".

Parissi's skeletonized quotation from Bouvier (page 6 of the petition) is incomplete. Omitted are Bouvier's statements that filing requires "making of the proper indorsement by the officer receiving the paper", and "The word carries with it the idea of permanent preservation of the thing so delivered and received; that it may become part of the public record. It is not synonomous with deposited". Here Parissi's notice of appeal was not endorsed as filed by

---

*An appellate court has no discretion, on general equitable grounds, to dispense with the statutory requirements for a timely appeal. *Yturbide's Executors* v. *United States*, 22 How. (63 U. S.), 290 (1859); cf. *Ray* v. *Morris*, 170 F. 2d 408 (7 Cir. 1948).

the Clerk, until May 25, 1954, after the statutory time for appeal had expired. And certainly the Clerk's mere retention of a document as a voluntary custodian, awaiting receipt of the filing fee, is not the equivalent of making an entry of filing in the Court docket and placing the document among the records of the Court available for public scrutiny.*

---

*Cf. *Oil Well Supply Co.* v. *Wickwire*, 52 F. Supp. 921, 923 (E. D. Ill. 1943), where it is stated:

> ". . . the document in question was not filed before September 20. It had not become a part of the files of the clerk's office. The actions of that official speak with significance. He received in the mail a transcript "to be filed". He did not file it but wrote that he had received it for the designated purpose and that the fee was $5 and must be remitted. When remittance arrived, for the first time, he marked the document filed. All this reflected only an intention upon his part to hold the document in abeyance as tendered for filing until the fee was received. Nothing in the language he used, or in his acts, indicate an intention to waive the prescribed statutory condition precedent, that is, payment of the filing fee. On the contrary, from the time the paper arrived in the mail until the fee was paid, he held the document as a voluntary custodian, withheld it from the official records, waived no collection of the fee and conferred upon the document nothing of official character until the condition precedent had been satisfied.
>
> "From another viewpoint, by submitting the papers to the Clerk of Wayne County, plaintiff's attorney made an offer or tender. The clerk did not accept this, but submitted a counter-offer,—that he would file the transcript when the fees were paid. Until plaintiff's attorney accepted this counter-proposal, by submitting the filing fee, the transcript was not filed. It may well be that if one makes a physical tender of the instrument, the clerk is in a position immediately to accept or reject it—with or without the prescribed filing fee. But where the document is delivered by mail, the clerk does not voluntarily receive it officially without advancement of the fees. He is under no obligation to file it until the fee has been paid. Though his conduct subsequent to the receipt of the paper, under certain circumstances, may be such that he is deemed constructively to have waived advancement of the fee, the clerk did not do this here; rather, he promptly informed plaintiff's attorney of the receipt of the instrument, and requested that the fee be forwarded."

That petitioner cannot properly criticize the Clerk for not taking special steps to relieve him of the consequences of his own neglect, is also evident. On noticing the absence of the filing fee, the Clerk acted in the only way a party, or a party's counsel, had any right to expect him to act: He sent a letter by return mail pointing out the defect and advising counsel of his refusal to file the notice until he received the statutory fee. And clearly the Clerk was under no obligation to file the notice of appeal until the filing fee prescribed by 28 U. S. C. § 1917 was paid.

> *Mondakota Gas Co.* v. *Montana-Dakota Utilities Co.*, 194 F. 2d 705 (9 Cir. 1952), rehearing denied, *ibid.* cert. denied 344 U. S. 827 (1952).
>
> "A motion to dismiss the appeal is before us.
>
> "Formal judgment was signed and entered in the docket of the District Court on November 8, 1951.
>
> "On December 3, 1951 a notice of appeal from the formal judgment of November 8, 1951 was received by the Clerk of the District Court but was not accompanied by the filing fee of $5.00; hence, the notice of appeal was not accepted for filing and was not then filed. The required filing fee was received by the Clerk on December 12, 1951 and the notice of appeal was on said date duly filed.
>
> * * *
>
> "Filing of notice of appeal within the required time is jurisdictional. The Clerk of the District Court was under no obligation to file the notice of appeal until the fee was paid. Appellant contends that the receipt and retention of the notice of appeal before the expiration of the thirty-day period constituted a filing. We are unable to agree.
>
> * * *

"In the instant case the failure to cause to be filed in time the notice of appeal was not a mere procedural irregularity; it was a jurisdictional defect.

* * *

"Appeal dismissed". (Footnotes omitted)

See also:

Smith v. *Johnston*, 109 F. 2d 152, 154 (9 Cir. 1940).

In accord:

Steever v. *Rickman*, 109 U. S. 74 (1883);
Turkett v. *United States*, 76 F. Supp. 769 (N.D. N. Y. 1948);
Anno v. *United States*, 113 F. Supp. 673 (Ct. Cl. 1953);
Oil Well Supply Co. v. *Wickwire*, 52 F. Supp. 921 (E. D. Ill. 1943)*;
Ommen v. *Talcott*, 180 Fed. 925, 926-7 (S. D. N. Y. 1910).

The reason behind the rule of these cases is well stated in the *Turkett* opinion, indicating the long followed and judicially sanctioned practice of the Clerk of the District Court for the Northern District of New York of requiring pay-

---

*The opinion in the *Oil Well Supply* case includes the following excerpt from 53 Corpus Juris 617-8 omitted from the abbreviated quotation from that work appearing in the petition (page 9): "'. . . valid filing . . . of an instrument is effected by delivering the instrument to the proper officer and paying him the fees allowed by law; and it has been held that unless there is prepayment of such fees, effective recording cannot be predicated upon the delivery of an instrument to the proper officer for record . . . Further, where there is no prepayment of the required fee, the recording officer may refuse the paper to record.'"

ment of statutory filing fees on presentation of papers for filing. In construing a similar statute (28 U. S. C. § 549, 1925 Ed.)* relating to the fee to be paid on institution of an action in a District Court, Judge Brennan of that Court, after pointing out that it is the filing of a complaint which institutes the action, stated (p 770), ". . . a prerequisite of the filing is the payment of the clerk's fees. Any other construction would open the door to actions without merit by irresponsible parties, and make the clerk a credit man, whose accountability might result in his personal loss."

As for the *nunc pro tunc* order of May 28, 1954, this order and the changes in docket entry and endorsement made by the Clerk pursuant to it are clearly without legal significance and cannot cure the fatal jurisdictional defect of late filing.** For as stated in *Credit Co.* v. *Ark. Central Railway*, 128 U. S. 258, 261 (1888):

---

*"*Fees of clerks of district courts; on institution of suit or proceeding.* Upon the institution of any suit or proceeding, whether by original process, removal indictment, information or otherwise, there shall be paid by the party or parties so instituting such suit or proceeding, as fees of the clerk for all services to be performed by him in such case or proceeding, except as hereinafter provided, the sum of $5. (Feb. 11, 1925, c. 204, § 2, 43 Stat. 857)."

**Petitioner errs when, in speaking of F.R.C.P. 60(b), he states (page 8) that "there would seem, also, to be room for Petitioner to act under this Rule" to relieve the defect. Firstly, the Court of Appeals did not suggest, as petitioner says it did (pages 3, 8) that he move under Rule 60(b). Judge Frank merely inquired if Parissi's counsel had any thoughts as to whether Rule 60(b) might provide a way for that court to avoid the necessity of dismissing the appeal. Secondly, the law is clear that the Federal Rules of Civil Procedure cannot be used to enlarge or diminish the jurisdiction of the Federal Courts. *United States* v. *Sherwood*, 312 U. S. 584, 590 (1941), *Sibbach* v. *Wilson*, 312 U. S. 1, 10 (1941). In *Perrin* v. *Aluminum Co. of America*, 197 F. 2d 254, 255 (9 Cir. 1952) it was specifically stated that ". . . Certainly Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting the time for appeal . . ."

> "The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."

In accord: *Old Nick William Co.* v. *U. S.*, 215 U. S. 541 (1910)

And *cf.*: *United States* v. *Hall*, 83 F. 2d 94 (1 Cir. 1936)

Contrary to the assertion at page 10 of the petition, the appellant in the *Mondakota* case, *supra*, *had* sought a *nunc pro tunc* order directing the Clerk to file the notice of appeal as of the date it had been received without the filing fee. But in that case the District Court correctly refused to grant any such order (Briefs and record on petition for certiorari, No. 152, October Term 1952).

Parissi's appeal was properly dismissed for lack of jurisdiction.

II. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY COURT OF APPEALS.

Petitioner indiscriminately charges that the decision of the Court of Appeals is in conflict with two decisions of this Court, seven decisions of other Courts of Appeal, and three other decisions of the Court of Appeals for the Second Circuit.*

---

*All but two of these decisions are specifically stated to be in conflict and are discussed in the petition at pages 4-7. The other two decisions, treated as if in conflict, relate to the propriety of the *nunc pro tunc* order and are discussed in the petition at pages 10-11.

These allegedly conflicting decisions are clearly distinguishable. Their rulings applied to the facts and statutes involved in this case would not have resulted in a different decision below.

Mutual Life Ins. Co. v. *Phinney*, 178 U. S. 327 (1900), cited at page 5 of the petition, dealt with the question of timely filing of a writ of error. The Court of Appeals for the Ninth Circuit had dismissed the appeal because the endorsement by the deputy clerk of the lower court merely stated that he had received a *copy* of the writ of error on a date within the prescribed time for taking the appeal, but did not state that the *original* writ of error had been received. This Court reversed, holding that it was the actual fact of filing which controlled and not the mere presence or absence of the endorsement on the original writ of error. An affidavit of the deputy clerk disclosed that the original writ of error had been presented and received with the copy, and had been treated by him as filed, although not endorsed by him because it was not his custom to endorse the original. Since the party seeking review had done in time all that was required of him, and the clerk's office had treated the original writ of error as in fact filed, the technical omission by the deputy clerk to endorse the original writ of error was held not to be a jurisdictional defect. In the present case, on the other hand, there was no timely compliance by Parissi with all that the statutes prescribed and the clerk did not treat the notice of appeal as filed until he received the statutory filing fee, after the time for appeal had passed.

In *Hill* v. *Hawes*, 320 U. S. 520 (1944), cited at page 10 of the petition, this Court, reversing the Court of Appeals for the District of Columbia, approved the action

of a District Judge in vacating an already-entered judgment and entering a new judgment in the same terms, in order to permit a new running of the time for appeal, on the grounds that the appellant had failed to make a timely filing of his notice of appeal because he relied on the requirements of F. R. C. P. 77(d) that the clerk should serve a notice of entry of the original judgment by mail on the losing party (and make a note of the mailing in his docket), and that the clerk had failed to do so. It is true that in the instant case it does not affirmatively appear that such a notice of entry was sent to Parissi *by the Clerk,* and there is no note to this effect in the District Court docket (R. 1). But ~~the clerk's~~ notice of entry *was* promptly served on Parissi by respondents' counsel (R. 28, Appendix, p. 2a), and Parissi clearly cannot meet the *Hill* v. *Hawes* requirement that the late filing was due to ignorance of the fact that judgment had been entered, in view of the fact that his notice of appeal (affirmatively indicating timely knowledge that the judgment had been entered) was originally mailed to the clerk in time. In any event, a conclusive answer to the citation of *Hill* v. *Hawes* is found in the 1946 amendments to F. R. C. P. 77(d)* and 73(a)** which, as the notes of the Advisory Committee on Rules clearly state, were intended to give an exclusive remedy (embodied in 28 U. S. C. § 2107) for such situations. Cf. *Huff* v. *United States*, 192 F. 2d. 911, 913 (5 Cir. 1951),

---

*"Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a)."

**". . . the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from . . . except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed . . ."

cert. denied 342 U. S. 946 (1952). As noted *supra*, p. 4n, this remedy was neither sought by, nor available to, Parissi.

Four Court of Appeals cases cited at pages 4-5 of the petition, *Oddo* v. *United States*, 171 F. 2nd 854 (2 Cir. 1949), cert. denied 337 U. S. 943 (1949), *Wallace* v. *United States*, 174 F. 2d 112 (8 Cir. 1949), cert. denied 337 U. S. 947 (1948), *Boykin* v. *Huff*, 121 F. 2d 865 (App. D. C. 1941), and *Williams* v. *United States*, 188 F. 2d 41 (App. D. C. 1951), involve criminal appeals, in which the time for appeal was set by the Federal Rules of Criminal Procedure and not by 28 U. S. C. § 2107. In each of these cases the appellant, unlike petitioner here, was incarcerated and acting *pro se**. And in each of these cases the appellant, unlike petitioner here, did everything within his power to effect a timely filing of the appeal. In the *Oddo* case the appellant had sent the filing fee to his prison warden promptly after knowledge of the entry of judgment and in time for it to have been transmitted to the clerk for timely receipt. The Court of Appeals held that appellant should not be charged with the delay caused by prison routine in the transmission of the fee. The facts and holding of the *Wallace* case are substantially the same as those in the *Oddo* case. In the *Boykin* case appellant, who had handed his notice of appeal to the district judge within the time for appeal, was excused for failure to pay the filing fee in time because the judge had failed to then inform him of the filing fee requirement. And in the *Williams* case the notice of appeal was delivered by appellant to a United States marshal who could have transmitted it to the clerk in time for the clerk to notify appellant of

---

*The doctrine of the cited cases has been distinguished, even in a criminal appeal, where the appellant was, as here, not acting *pro se* but was represented by counsel in the district. *Crow* v. *United States*, 203 F. 2d 670 (9 Cir. 1953).

the filing fee requirement, and receive the fee from him, within the time permitted for appeal. The Court held the appellant should not be charged with the marshal's delay.

In *Crump* v. *Hill*, 104 F. 2d 36 (5 Cir. 1939), cited at page 6 of the petition, although no formal notice of appeal had been filed in time, appellant had filed with the clerk appellee's waiver of a notice of appeal, appellee's entry of appearance to the appeal, and appellant's designation of the record on appeal, all within the time for appeal, and within that time appellee had also filed with the clerk its own designation of the record on appeal. The Court held that this was the "complete equivalent" of the filing of a notice of appeal. In the case presented by this petition, *nothing* had been *filed* with the clerk within the requisite 30-day period.*

Casalduc v. *Diaz*, 117 F. 2d 915 (1 Cir. 1941), cert. denied 314 U. S. 639 (1941), cited at page 6 of the petition,** relates to an appeal in a bankruptcy case. The appeal was dismissed for lack of jurisdiction. The Court accepted as true the statement of appellant's counsel that after the

---

*Subsequent to its decision in *Crump* v. *Hill*, the Court of Appeals for the Fifth Circuit, in *Morrow* v. *Wood*, 126 F. 2d 1021 (1942), had before it a situation where appellant had filed a transcript, praecipe, supersedeas bond, and designation of record, all within the allowable period for appeal. Appellees had notice of these proceedings. However, the notice of appeal had been filed after the period had expired and no extension of time had been obtained. The Court dismissed the appeal, holding (1) the defect was jurisdictional and (2) even if the proceedings taken were to be considered to have constituted such substantial compliance with the law as to give jurisdiction, the appeal should be dismissed for failure to file and docket the record within the time prescribed by F.R.C.P. 73(g). Other cases distinguishing *Crump* v. *Hill* are *Mondakota Gas Co.* v. *Montana-Dakota Utilities Co.*, 194 F. 2d 705, 706 (9 Cir. 1952), rehearing denied, *ibid*, cert. denied 344 U. S. 827 (1952), and *Howard* v. *Local 74*, 208 F. 2d 930, 934 (7 Cir. 1953).

**And again cited at page 7 of the petition, where the headnote to this case appearing at 4 Fed. Rules Serv. 818 is quoted.

closing hour of the clerk's office on the last day for filing, he had slipped the notice of appeal under the clerk's door. But the Court held that this act had not satisfied even the first requirement for a filing: That the document be delivered into the actual custody of the clerk. This requirement failing, the Court did not go into the question of whether any other requirements, such as the payment of any filing fee, had been met.

In *Reynolds* v. *Imlay,* 118 F. 2d 53 (App. D. C. 1941), cited at page 7 of the petition, there were conflicting statements in affidavits before the court regarding occurences below relating to the time of tender to the clerk of a notice of appeal in an *in forma pauperis* action. The Court did not pass on the question of timely filing, but merely submitted the conflict of fact to the District Court under F. R. C. P. 75 (h), with the request that it settle the controversy and conform the record to the truth.

The Court in *United States* v. *Todar,* 41 F. 2d 146 (7 Cir. 1930), cited at page 10 of the petition, was dealing with 28 U. S. C. § 230, 1925 Ed. which required that an appeal be "applied for" in the court which gave the judgment, within three months after its rendition. Judgments had been entered on August 22, 1928. On November 19, 1928, there were filed in the clerk's office notices of appeal with proof of service, a motion for an extension of the time for filing bills of exceptions and assignments of errors, and an order of the court granting the motions. On December 11, 1928 another order was filed granting another 30-day extension, and on December 26, 1928 the bills of exceptions and assignments of error were filed. On January 14, 1929, an order was filed, "*nunc pro tunc* as of November 19, 1928", enlarging the time for docketing the appeals, and on March 30,

1929 an order was filed allowing appellant in each case an appeal, "*nunc pro tunc* as of November 19, 1928." The Court of Appeals held that the order of November 19, 1928 was a nullity because it was entered after commencement of a new term of court, and that since the bills of exceptions were thus not part of the record before it, the judgments below must be affirmed. Before so holding, it assumed that the order of March 30, 1921 "sufficiently manifests application for an allowance of the appeals by the District Court as of November 19, 1928" (p. 147). The Court of Appeals did not hold that the "*nunc pro tunc* order" validated an otherwise untimely appeal. Since it was the actual fact of allowance, rather than any formal order of allowance which controlled (*Brandies* v. *Cochran*, 105 U. S. 262, 1881), the Court of Appeals clearly felt, and in effect stated, that the District Judge had in fact allowed the appeal on November 19, 1928.* His orders of November 19, December 11 and January 14, indicating a belief on his part that the appeal was in progress, corroborate this. The order of March 30, 1929 merely set the record straight; it was not a retroactive allowance of the appeal.

The Court in *United Drug Co.* v. *Helvering*, 108 F. 2d 637 (2 Cir. 1940), cited at page 5 of the petition, was dealing with an appeal under § 906(g) of The Revenue Act of 1936 from an order of the United States Processing Tax Board of Review. The appeal was dismissed for lack of jurisdiction. The statute required that a petition for review be filed "in the Circuit Court of Appeals" within three months after the decision of the Board. Nothing was

---

*If the Court of Appeals had been in doubt as to this fact it could have sent the case back to the District Court for a determination on the point, as the Court did in *Donaldson* v. *Baltimore Acceptance Corp.*, 38 F. 2d 215 (3 Cir. 1930).

presented to the clerk of the Court of Appeals until after that, although a petition had been filed with the clerk of the Board in time. The Court addressed itself to the question whether this filing was a compliance with the statute and held that it was not. It did not make any ruling as to what constituted a "filing", although it did speak of the need for some paper to be "lodged" in the proper court.

In the *United Drug Co.* case, the Court of Appeals referred to its earlier opinion in *Jarowski* v. *Hamburg American Packet Co.*, 186 Fed. 332 (2 Cir. 1911), cited by Parissi at page 5 of the petition. After questioning the correctness of its holding in the earlier case, it distinguished it on the ground that in the case before it appellee had done nothing to mislead the appellant into permitting the time within which an appeal should be taken to expire, as he had in the *Jarowski* case. The distinction is equally applicable to the present case.

Petitioner's quotation at page 6 of the petition from *Federal Deposit Ins. Corp.* v. *Congregation Poiley Tzedeck*, 159 F. 2d 163, 166 (2 Cir. 1946) itself reveals that the Court there took a position in accord with, and not opposed to, the decision in this case. For as shown *supra*, the minimum requirement for taking an appeal stated in that case, "that some paper . . . be accessible in *the records of a court* upon which both judges and parties can rely", was not complied with here until after the expiration of the statutory time.

From the foregoing, it is readily apparent that the aserted conflict between the decision below and the cases cited by petitioner "arises from differences in states of fact, not in the application of a principle of law". *Wisconsin Electric Co.* v. *Dumore Co.*, 282 U. S. 813 (1931). It is

also apparent that the decision below was and is wholly in conformity with those prior rulings which related to the same, or similar, fact situations.

III. THE DECISION OF THE COURT OF APPEALS DOES NOT RAISE ANY ISSUE OF PUBLIC IMPORTANCE

The question before the Court of Appeals was not novel or unsettled. The Court's decision was correct and in harmony with prior holdings relating to time for appeals.

The right of appeal is not a natural right, preserved by the Constitution, nor is it essential to due process of law. An appeal is granted to a losing party on condition that he comply with the statutes permitting the appeal. The statutes involved in the instant case are clear and unambiguous, and have been uniformly interpreted. Their stated requirements are not troublesome to the ordinary practitioner or litigant. There is no judicially sanctioned excuse for petitioner's failure to observe them here.

A District Court clerk does not, as contended at page 9 of the petition, "have arbitrary power, even to the extent of defeating appellate jurisdiction". No clerk could validly preclude an effective filing of a notice of appeal timely received by him with the filing fee. But a prospective appellant, and his counsel, do have such power. If jurisdiction of the Court of Appeals in this case can be said to have been "defeated", it was defeated by petitioner's prolonged indecision to take the appeal and his failure to observe the statutory requirements in his last minute attempt to do so. The defeat is of importance only to the parties to this case.

The petition does not present substantial grounds requiring review.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES H. WALKER
Counsel for Respondents
20 Exchange Place
New York 5, New York

Of Counsel:

CHARLES E. NICHOLS
75 State Street
Albany 1, New York

HENRY J. ZAPIAN
20 Exchange Place
New York 5, New York

September 20, 1954

APPENDIX

28 U. S. C. § 2107, 1948 Ed.

28 U. S. C. § 2107. Time for appeal to court of appeals

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11. (As amended May 24, 1949, c. 139, §§ 107, 108, 63 Stat. 104)

Notice of Entry of Judgment and Affidavit of Service

UNITED STATES OF AMERICA
DISTRICT COURT CLERK'S OFFICE
NORTHERN DISTRICT OF NEW YORK

I, G. A. PORTER, Clerk of the District Court of the United States for the Northern District of New York, DO HEREBY CERTIFY that I have compared the annexed copy of Judgment—Telechron, Inc. and General Electric Company against Anthony J. Parissi Civil 3831 with the original now on file in this office; that the same is a correct transcript therefrom and of the whole of said original.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be affixed at the City of Utica, in said District, this 22nd day of April, A. D. 1954

G. A. PORTER, *Clerk.*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

TELECHRON, INC. and GENERAL ELECTRIC COMPANY, Plaintiffs, v. ANTHONY J. PARISSI, Defendant.	Civil Action No. 3831

JUDGMENT

This action having been tried before the Court, and the evidence and briefs having been considered, and the

Court on April 12, 1954 having rendered its opinion and made findings of fact and conclusions of law, it is hereby

ORDERED, ADJUDGED and DECREED:

1. That defendant is the owner of patents 2,444,748 and 2,512,775, and reissue patent 23,261.

2. That each of claims 7, 11, 16, 19 and 20 of patent 2,444,748 is invalid and void.

3. That each of claims 7, 11, 16 and 19-27 of reissue patent 23,261 is invalid and void.

4. That each of claims 10 and 11 of patent 2,512,775 is invalid and void.

5. That no subject matter disclosed in patent 2,444,748, patent 2,512,775 or reissue patent 23,261, or any related subject matter, was ever disclosed to either plaintiff in confidence or subject to an understanding, express or implied, that compensation would be paid to defendant therefor by either plaintiff.

6. That all flashing light alarm clocks, switch alarm clocks, electric clocks having a time controlled switch, radio alarm clocks, and radio receivers embodying or controlled by clocks, and all components thereof, manufactured and/or sold by each plaintiff were developed independently of any disclosure to either plaintiff by defendant.

7. That defendant has no rights in or based upon any subject matter disclosed in patent 2,444,748, patent

2,512,775 or reissue patent 23,261, or in or based upon any related subject matter, whether those rights be said to arise under the patent laws, from a contract or understanding, express or implied in fact or in law, confidential disclosure, or otherwise, which have been violated by either plaintiff by the manufacture, use or sale of flashing light alarm clocks, switch alarm clocks, electric clocks having a time controlled switch, radio alarm clocks, radio receivers embodying or controlled by clocks, or any component of any of them, or otherwise.

8. That defendant's first and second counterclaims are hereby dismissed.

9. That defendant, his agents, servants, employees, attorneys and assigns, be and they hereby are enjoined from bringing any suit against either plaintiff, or any licensee of either plaintiff, or any purchaser or user of flashing light alarm clocks, switch alarm clocks, electric clocks having a time controlled switch, radio alarm clocks, or radio receivers embodying or controlled by clocks, or any components of any of them, manufactured or sold by either plaintiff, or by any licensee of either plaintiff, (1) charging infringement of claims 7, 11, 16, 19 or 20 of patent 2,444,748, claims 7, 11, 16, 19-27 of reissue patent 23,261, or claim 10 or 11 of patent 2,512,775, or (2) charging that any other right of defendant in or based upon any subject matter disclosed in any of these patents, or in or based upon any related subject matter, has been violated by either plaintiff, or by any licensee of either plaintiff, in any way, or by such purchaser or user by its possession, use or sale of any such clock, radio clock combination, or any component of

10. That plaintiffs recover from defendant their costs in this action, to be taxed by the Clerk of this Court and made part of this judgment.

JAMES T. FOLEY
United States District Judge

Albany, New York
April 21, 1954

To: ANDROS & SMITH, ESQS.,
Attorneys for Defendant

SIRS:

TAKE NOTICE, that in the within entitled action, a Judgment, whereof the within is a copy, herewith served upon you has been this day duly entered in the office of the Clerk of the United States District Court for the Northern District of New York at Utica, New York.

Dated: April 22, 1954.

Yours, &c.,

WHALEN, MCNAMEE, CREBLE & NICHOLS,
Attorneys for the Plaintiffs,
Office & Post Office Address,
75 State Street,
Albany, New York

UNITED STATES DISTRICT COURT

Northern District of New York

Civil Action No. 3831

Telechron, Inc. and
General Electric Company,
Plaintiffs,

—against—

Anthony J. Parissi,
Defendant.

JUDGMENT

Whalen, McNamee, Creble &
Nichols
Attorneys for Plaintiffs,
Office and Post-Office Address
75 State Street
Albany, N. Y.

Orig. filed

April 22, 1954

G. A. Porter
Clerk

STATE OF NEW YORK }
COUNTY OF ALBANY } ss.:

BERTHA ULMA, being duly sworn, deposes and says that she is over twenty-one years of age, and that on the 23rd day of April, 1954, at the Post Office in the City of Albany, New York, deponent deposited a copy of a Judgment, whereof the foregoing is a copy, properly enclosed in a post-paid wrapper, directed to Andros & Smith, Esqs., 90 State Street, Albany, New York, that being the address designated by them as attorneys for the defendant herein, for such purposes.

BERTHA ULMA

Subscribed and sworn to before me
this 23rd day of April, 1954.

E. MAE KINGSTON

E. MAE KINGSTON
Notary Public, State of New York
Residing in Albany county
Albany County Clerk's No. 482
My commission expires March 30, 1955

LIBRARY
SUPREME COURT, U.S.

Office Supreme Court, U.S.
FILED
MAR 11 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954

No. 302

ANTHONY J. PARISSI,
Petitioner,

v.

TELECHRON, INC., and
GENERAL ELECTRIC COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

CHARLES H. WALKER
Counsel for Respondents
20 Exchange Place
New York 5, New York

Of Counsel:

CHARLES E. NICHOLS
HENRY J. ZAFIAN

March 9, 1955

INDEX

	PAGE
No Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	3
Summary of Argument	5
Argument	6
I. The Court of Appeals Had No Power to Review the Judgment of April 22, 1954 Unless a Notice of Appeal Was Filed on or Before May 22, 1954	6
II. No Notice of Appeal From the Judgment of April 22, 1954 Was Filed, or Should Be Considered to Have Been Filed, Until May 25, 1954	7
III. The *Nunc Pro Tunc* Order of May 28, 1954 Was a Nullity	18
Conclusion	23

CITATIONS

PAGE

CASES:

Ackerman v. *United States*, 340 U. S. 193 (1950) .. 22
Anno v. *United States*, 113 F. Supp. 673 (Ct. Cl. 1953) 10

Boykin v. *Huff*, 121 F. 2d 865 (App. D. C. 1941) .. 16
Brandies v. *Cochran*, 105 U. S. 262 (1881) 20

Credit Co. v. *Ark. Central Railway*, 128 U. S. 258 (1888) 18
Crow v. *United States*, 203 F. 2d 670 (9 Cir. 1953) 17

Ex parte Dante, 228 U. S. 429 (1913) 7

F. T. C. v. *Minneapolis-Honeywell Co.*, 344 U. S. 206 (1952) 22

George v. *Victor Co.*, 293 U. S. 377 (1934) 7

Healy v. *Pennsylvania R. Co.*, 181 F. 2d 934 (3 Cir. 1950), cert. denied 340 U. S. 935 (1951), rehearing denied 341 U. S. 912 (1951) 13
Heike v. *United States*, 217 U. S. 423 (1910) 7
Hill v. *Hawes*, 320 U. S. 520 (1944) 20, 21, 22
Huff v. *United States*, 192 F. 2d 911 (5 Cir. 1951) .. 22

Matton Co. v. *Murphy*, 319 U. S. 412 (1943) 6
Mondakota Gas Co. v. *Montana-Dakota Utilities Co.*, 194 F. 2d 705 (9 Cir. 1952), cert. denied 344 U. S. 827 (1952) 9
Mutual Life Ins. Co. v. *Phinney*, 178 U. S. 327 (1900) 14

North Umberland Mining Co. v. *Standard Acc. Ins. Co.*, 193 F. 2d 951 (9 Cir. 1952) 20

Oddo v. *United States*, 171 F. 2d 854 (2 Cir. 1949), cert. denied 337 U. S. 943 (1949) 16

PAGE

Oil Well Supply Co. v. *Wickwire*, 52 F. Supp. 921 (E. D. Ill. 1943) 10
Old Nick Williams Co. v. *U. S.*, 215 U. S. 541 (1910) 18
Ommen v. *Talcott*, 180 Fed. 925 (S. D. N. Y. 1910) 10
Perrin v. *Aluminum Co. of America*, 197 F. 2d 254 (9 Cir. 1952) 23
Ray v. *Morris*, 170 F. 2d 498 (7 Cir. 1948) 13
Reynolds v. *Imlay*, 118 F. 2d 53 (App. D. C. 1941) 15
Smith v. *Johnston*, 109 F. 2d 152 (9 Cir. 1940) 10
Steever v. *Rickman*, 109 U. S. 74 (1853) 10
Telechron, Inc. and General Electric Company v. *Anthony J. Parissi*, 120 F. Supp. 235 (N. D. N. Y. 1954) 3
Turkett v. *United States*, 76 F. Supp. 769 (N. D. N. Y. 1948) 10
United States v. *Todar*, 41 F. 2d 146 (7 Cir. 1930) 19
Wallace v. *United States*, 174 F. 2d 112 (8 Cir. 1949), cert. denied 337 U. S. 947 (1948) 16
Williams v. *United States*, 188 F. 2d 41 (App. D. C. 1951) 16
Yturbides Executors v. *United States*, 33 How. (63 U. S.) 290 (1859) 13

STATUTES:

27 Stat. 252 (July 20, 1892) 9
43 Stat. 857, c. 204 (Feb. 11, 1925) 8, 11
28 U. S. C. § 230 (1925 Ed.) 19
28 U. S. C. § 549 (1928 Ed.) 11
28 U. S. C. § 1254 (1) 1
28 U. S. C. § 1915 9
28 U. S. C. § 1917 .....2, 3, 8, 10
28 U. S. C. § 2107 .....2, 6, 21, 22

PAGE

FEDERAL RULES:

F. R. C. P. 5(e) 13
F. R. C. P. 6(a) 8
F. R. C. P. 6(b)(2) 20
F. R. C. P. 6(d) 20
F. R. C. P. 7(b)(1) 20
F. R. C. P. 60 22
F. R. C. P. 60(a) 19
F. R. C. P. 60(b) 20, 22
F. R. C. P. 73(a) 7, 18, 20, 21, 22
F. R. C. P. 73(c) 12
F. R. C. P. 75(h) 15
F. R. C. P. 77(a) 13
F. R. C. P. 77(c) 13
F. R. C. P. 77(d) 22

OTHER AUTHORITY:

6 Moore's Federal Practice (2d Ed. 1953) § 60.03 .. 22
Debate on H. R. 5420, 65 Cong. Record 10,580 ... 8
House Report 607, 68th Congress, 1st Session, on H. R. 5420 8
53 Corpus Juris 617-618 15

Supreme Court of the United States

OCTOBER TERM, 1954

No. 302

ANTHONY J. PARISSI,

Petitioner,

v.

TELECHRON, INC., and
GENERAL ELECTRIC COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

No Opinion Below

The decision of the Court of Appeals (R. 10) was entered without opinion.

Jurisdiction

The order and judgment of dismissal in the Court of Appeals (R. 11) was entered the same day as its decision, June 10, 1954. The petition was filed August 24, 1954 and was granted October 25, 1954. The jurisdiction of this

Questions Presented

1. Whether a notice of appeal in a civil action, received by a district court clerk by mail, with an appeal bond, one day before the last day of the 30 day period prescribed by 28 U. S. C. § 2107 for filing a notice of appeal, but withheld by him from filing until after the expiration of that period because the attorney who sent the notice of appeal had failed to enclose the filing fee prescribed by 28 U. S. C. § 1917 and had not responded until after expiration of the period to the clerk's return mail letter advising him of the withholding and of the fee requirement, was, nevertheless, filed in time under 28 U. S. C. § 2107 so as to bring the district court judgment before the Court of Appeals for review.

2. If the notice of appeal was not filed within the period prescribed by 28 U. S. C. § 2107 to bring the district court judgment before the Court of Appeals for review, whether this jurisdictional defect was cured by a subsequent order of the district court, obtained *ex parte* without any written motion or notice, directing the clerk to accord the notice of appeal a filing date *nunc pro tunc* as of the day it was received by him without the filing fee.

Statutes Involved

The pertinent provisions of 28 U. S. C. § 2107 (omitting paragraphs relating to proceedings in which the United States or an officer or agency thereof is a party and to admiralty and bankruptcy proceedings) are as follows:

Time for appeal to court of appeals.

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

* * *

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

28 U. S. C. § 1917 reads as follows:

District courts; fee on filing notice of or petition for appeal.

Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari $5 shall be paid to the clerk of the district court, by the appellant or petitioner.

Statement

On April 22, 1954, the clerk of the United States District Court for the Northern District of New York, at Utica, entered a judgment (R. 3-4) in favor of declaratory plaintiffs in *Telechron, Inc. and General Electric Company* v. *Anthony J. Parissi*, Civil Action No. 3831. The district court opinion on the merits, rendered April 12, 1954, is reported at 120 F. Supp. 235.

On April 23, 1954, notice of the entry of the judgment on April 22, 1954, including a certified copy of the judgment endorsed by the clerk as filed on April 22, 1954, was served by mail on Parissi's attorneys, Andros & Smith of Albany, New York, by Whalen, McNamee, Creble & Nichols, also of Albany, attorneys for plaintiffs (R. 2-6).

On May 21, 1954, a Friday, (one day before the last day of the statutory 30-day period for appeal), the clerk received by mail a notice of appeal (R. 6) from the judgment of April 22, 1954, and an appeal bond, mailed the preceding day by Andros & Smith. The same day the clerk wrote to Andros & Smith stating that he was obliged to withhold filing and the sending of a copy of the notice of appeal to opposing counsel pending his receipt of the statutory filing fee of $5.00, which Andros & Smith had failed to enclose (R. 9).

On May 24, 1954, a Monday, Harry A. Smith, Esq., of Andros & Smith, forwarded the fee (R. 9). The fee was received by the clerk on May 25, 1954 (three days after expiration of the statutory period), and the notice of appeal and bond were then filed on that day, May 25, and copies sent to plaintiffs' attorneys, as shown by the clerk's entries in the district court docket (R. 1) and his endorsement on the back of the notice of appeal (R. 6).

Seeking to cure this filing out of time, Mr. Smith, on affidavit (R. 7-8) and without any written motion or prior notice to respondents, obtained *ex parte* an order of the district court (R. 7), dated May 27, 1954, directing that the notice of appeal be accorded a filing date *nunc pro tunc* as of May 21, 1954.

On May 28, 1954 this order was entered (R. 1). Pursuant to it the clerk made a notation in the district court

docket (R. 1), and in his endorsement on the back of the notice of appeal (R. 6), changing the recorded filing date of the notice of appeal from May 25, 1954 to May 21, 1954.

On June 3, 1954 a partial record was certified and transmitted to the Court of Appeals and respondents moved to dismiss the appeal for lack of jurisdiction (R. 10).

On June 10, 1954 the Court, after considering the briefs and hearing argument of the parties, dismissed the appeal (R. 10-11).

Summary of Argument

The Court of Appeals could not acquire jurisdiction over any appeal from the judgment of April 22, 1954 unless a notice of appeal was filed on or before May 22, 1954. The notice of appeal was not filed by the clerk until May 25, 1954 because he did not receive the statutory filing fee until that day. The clerk's receipt on May 21, 1954 of the notice of appeal and appeal bond, without the filing fee, did not constitute a filing. The clerk, who satisfied whatever obligation he may have had to promptly advise petitioner's attorney of the statutory filing fee requirement, was under no obligation to file the notice of appeal until the filing fee was paid. Rather, it was the obligation of the attorney to do all that the law required to be done in order to cause the notice of appeal to be filed in time. This he did not do.

To hold, in a civil case devoid of any exculpatory circumstances, that a clerk's receipt of a notice of appeal, without the statutory filing fee, is itself a filing and, consequently, that a clerk is under a duty to endorse, docket and treat a notice of appeal (and other papers having a statutory filing fee) as filed when received without the fee, as petitioner

contends, would in effect deprive fee-prescribing statutes of enforceability and place attainment of their legislative objectives at the whim of counsel.

Here no justification has been attempted for the almost 4 weeks delay in sending in the notice of appeal. The Court should not encourage by condonement an attorney's inexcusable delay and disregard of statutory provisions regulating procedures in the courts in which he practices.

The district court's *nunc pro tunc* order was a nullity. Since no notice of appeal was filed during the prescribed statutory period, the power of the Court of Appeals to review the judgment of April 22, 1954 expired when the period did. It could not be retroactively revived.

Argument

I. THE COURT OF APPEALS HAD NO POWER TO REVIEW THE JUDGMENT OF APRIL 22, 1954 UNLESS A NOTICE OF APPEAL WAS FILED ON OR BEFORE MAY 22, 1954.

The purpose of statutes limiting the period for appeal was stated in *Matton Co.* v. *Murphy,* 319 U. S. 412, 415 (1943) to be

> "to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose."

Apart from exceptions not applicable here, 28 U. S. C. § 2107 prescribes that

> "no appeal shall bring any judgment . . . in an action . . . of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment . . ."

F. R. C. P. 73(a) is to the same effect.

The statute is peremptory. Failure to comply with its requirements deprives the Court of Appeals of jurisdiction to review. *George* v. *Victor Co.*, 293 U. S. 377 (1934). There is no right to appeal in the Federal courts save as it is granted or authorized by Congress. See *Heike* v. *United States*, 217 U. S. 423, 428 (1910); cf. *Ex parte Dante*, 228 U. S. 429, 432 (1913).

The district court judgment was entered on April 22, 1954 (R. 1). The prescribed 30 day period for filing a notice of appeal from that judgment, calculated in accordance with F. R. C. P. 6(a), thus expired on May 22, 1954.

II. NO NOTICE OF APPEAL FROM THE JUDGMENT OF APRIL 22, 1954 WAS FILED, OR SHOULD BE CONSIDERED TO HAVE BEEN FILED, UNTIL MAY 25, 1954.

The facts are clear and undisputed that no notice of appeal from the judgment of April 22, 1954 was endorsed, docketed or treated as filed by the clerk of the district court until May 25, 1954, 3 days after expiration of the prescribed statutory period for filing a notice of appeal.

However, petitioner urges that his notice of appeal should be considered to have been filed, and the appeal properly taken, as of May 21, 1954 when the clerk received the notice of appeal and appeal bond, but not the statutory filing fee which petitioner's attorney had failed to include. And petitioner contends that the clerk's failure to endorse and

docket the notice of appeal on May 21, 1954, despite the absence of the prescribed filing fee, "was an act of omission of his official duty" (P. Br. 8).

We may readily grant that the essential legal element of an effective filing is not necessarily determined by the presence or absence of a clerk's endorsement or docket entry. If petitioner's attorney had on May 21, 1954 done everything that the law required him to do in order to entitle him to have the notice of appeal filed by the clerk, any failure of the clerk to do his official duty by then endorsing and docketing the notice could not prevent the jurisdiction of the Court of Appeals from being properly invoked.

But did the clerk fail to do his official duty here? Did petitioner's attorney act in diligent compliance with the statutory requirements entitling him to have the notice of appeal filed by the clerk before May 25, 1954? The Court of Appeals, through its dismissal of the appeal, answered these questions in the negative.

The $5 filing fee prescribed by 28 U. S. C. § 1917 was first established by 43 Stat. 857, c. 204 (Feb. 11, 1925), providing for the payment of several $5 fees "upon" the rendering of different services by a district court clerk at various stages of the prosecution of an action. The stated purposes of 43 Stat. 857 were to eliminate a multitude of petty fees throughout the course of a litigation and to "simplify the work of the clerks of the United States district courts and at the same time be more understandable to members of the bar who practice in the Federal courts" (House Report 607, 68th Cong., 1st Session, on H. R. 5420 which became 43 Stat. 857), and "to save a lot of bookkeeping" (Debate on H. R. 5420, 65 Cong. Record 10,580). Indicative of the congressional awareness that

the only practical way to achieve these purposes was by payment of such fees at or before the time when the clerk's service was requested, is the provision in 43 Stat. 857 that it should not affect the Act of July 20, 1892, 27 Stat. 252, (now 28 U. S. C. § 1915), providing for the institution and prosecution of *in forma pauperis* actions without *prepayment* of fees.

The only reported opinion we have found having a square holding on the precise question of whether payment of the filing fee prescribed by § 1917 is necessary before a prospective appellant has the right to have his notice of appeal filed by the clerk of the district court is *Mondakota Gas Co.* v. *Montana-Dakota Utilities Co.*, 194 F. 2d 705 (9 Cir. 1952), rehearing denied *ibid.* In that case the Court, in dismissing an appeal for lack of jurisdiction for failure to cause a notice of appeal to be filed in time, stated (p. 705):

> "A motion to dismiss the appeal is before us.
>
> "Formal judgment was signed and entered in the docket of the District Court on November 8, 1951.
>
> "Notice of entry of the formal judgment was mailed to counsel for appellant on November 8, 1951.
>
> "On December 3, 1951 a notice of appeal from the formal judgment of November 8, 1951 was received by the Clerk of the District Court but was not accompanied by the filing fee of $5.00; hence, the notice of appeal was not accepted for filing and was not then filed. The required filing fee was received by the Clerk on December 12, 1951 and the notice of appeal was on said date duly filed . . .
>
> "No extension of time was given by the District Court pursuant to Rule 73(a), Fed. Rules Civ. Proc. 28 U. S. C. A.

> "Filing of notice of appeal within the required time is jurisdictional. The Clerk of the District Court was under no obligation to file the notice of appeal until the fee was paid. Appellant contends that the receipt and retention of the notice of appeal before the expiration of the thirty-day period constituted a filing. We are unable to agree.
>
> * * *
>
> ". . . In the instant case the failure to cause to be filed in time the notice of appeal was not a mere procedural irregularity; it was a jurisdictional defect . . .
>
> "Appeal dismissed." (Footnote omitted)

A petition for a writ of certiorari to review the holding of the court in the *Mondakota Case* was denied by this Court (No. 152, October Term 1952) at 344 U. S. 827 (1952).*

The case of *Turkett* v. *United States*, 76 F. Supp. 769 (N. D. N. Y. 1948) is also of significance here in indicating the judicially sanctioned right** of the clerk of the district court for the Northern District of New York (the court in which the present case arose) to require payment of filing fees under statutes such as 28 U. S. C. § 1917 before accepting a paper for filing, and the practical necessity for that

---

*Another case approving the right of a clerk to refuse to file a notice of appeal until the statutory filing fee has been paid is *Smith* v. *Johnston*, 109 F. 2d 152, 154 (9 Cir. 1940). Compare *Steever* v. *Rickman*, 109 U. S. 74 (1883), *Anno* v. *United States*, 113 F. Supp. 673 (Ct. Cl. 1953), *Oil Well Supply Co.* v. *Wickwire*, 52 F. Supp. 921 (E. D. Ill. 1943), *Ommen* v. *Talcott*, 180 Fed. 925, 926-7 (S. D. N. Y. 1910).

**Rule 5 of the new Rules of the District Court, adverted to by petitioner (P. Br. 7, 12) as setting up a new practice, merely expresses the long-followed rule, exemplified by the *Turkett* case, that the clerk is not required to perform any service for which a fee is prescribed unless the fee is paid in advance.

requirement. In construing a statute (28 U. S. C. § 549, 1928 Ed.),* which also originated in 43 Stat. 857 and which related to the fee to be paid on the institution of an action in a district court, the court, after pointing out that the filing of a complaint was needed to institute the action, stated (p. 770):

> ". . . a prerequisite of the filing is the payment of the clerk's fees. Any other construction would open the door to actions without merit by irresponsible parties and make the clerk a credit man, whose accountability might result in his personal loss".

Clearly, in view of the *Turkett* holding and on principle, it cannot rightly be argued that the clerk's refusal in this case to file the notice of appeal without payment of the statutory filing fee, was "an act of omission of his official duty" (P. Br. 8). To rule that it was could result in the Government not receiving the fees it has prescribed (for papers other than notices of appeal as well) or in district court clerks suffering personal losses if called to account, and, in addition, would cause an increase in the bookkeeping and accounting work of the already heavily burdened clerks' offices, (with possible delay in the prompt and efficient administration of justice), contrary to the intendment of the filing fee statutes.

Even in a hard case, caused by a barren, formal technicality applied against a diligent but understandably

---

*"*Fees of clerks of district courts; on institution of suit or proceeding.* Upon the institution of any suit or proceeding, whether by original process, removal, indictment, information or otherwise, there shall be paid by the party or parties so instituting such suit or proceeding, as fees of the clerk for all services to be performed by him in such case or proceeding, except as hereinafter provided, the sum of $5. (Feb. 11, 1925, c. 204, § 2, 43 Stat. 857)."

confused party, it might well not be in the ultimate interest of justice to inject such risks, burdens and confusion into the collection of fees, or uncertainty as to whether or not appellate jurisdiction has been properly invoked.

But this is not a case in which one's sense of fundamental justice is offended by the holding below that the appeal was not timely. This is a case of inexcusable neglect. Here no justification is attempted for the nearly four weeks' delay after entry of judgment (over five weeks' delay after the court's opinion) in sending in the notice of appeal. Nor is there any excuse for petitioner's attorney not to have known and followed the few explicit statutory provisions regulating the procedure in the court in which he practices. Certainly, it is no excuse (P. Br. 7) that the fee provision appeared in the Judicial Code, Title 28, instead of in the local court rules. And justification for the absence of the filing fee cannot be found in the fact that an appeal bond accompanied the notice of appeal (P. Br. 16). That bond is intended to cover costs in the Court of Appeals, such as the cost of printing the record, and specifically secures only the appellees, not the clerk of the district court.

It should also be noted that while the record is by no means clear on this point, it seems likely that the clerk's letter advising of the withholding from filing pending receipt of the statutory fee, arrived at the office of petitioner's attorney on the last day of the statutory period for appeal and in time to have the notice of appeal filed within that period, but that the attorney was absent from his office that day.*

*The clerk's letter is dated May 24th. Albany is less than 100 miles from Utica on the New York Central Railroad. It took only one day for each of the other papers in this record passing from one city to another. See e.g. Mr. Smith's letter to the clerk of May

Of interest here are the statements of the Court of Appeals for the Third Circuit in *Healy* v. *Pennsylvania R. Co.*, 181 F. 2d 934, 936 (3 Cir. 1950), cert. denied 340 U. S. 935 (1951), rehearing denied 341 U. S. 912 (1951):

> "We are not oblivious of the trend away from those niceties which so often in the past harassed both litigants and the courts. But we are not here insisting upon mere satisfaction of barren formal technicalities. Howsoever liberal we may wish to be, it cannot be gainsaid that certain formalities are indispensable to 'just, speedy, and inexpensive' litigation, and these attributes of our federal judicial system are forthcoming only upon adherence to, rather than upon rejection of, the Rules. *It is of the highest importance that the appellate function be free of, and protected from, the needless jurisdictional doubts so simply avoidable by compliance with a few specific instructions. The alternative can but induce a laxity destined to obscure the lines of proper appellate conduct,** with consequent expense and hardship to the litigants, whose duty it is in the first instance to see to it that the record is in proper form for the relief sought."**

20th, received May 21st (R. 9); Mr. Smith's letter to the clerk of May 24th, received May 25th (R. 9, 1); Judge Foley's nunc pro tunc order signed by him in Albany on May 27th (R. 7), received and filed in Utica on May 28th (R. 1). Mr. Smith's affidavit on the nunc pro tunc motion states that he did not "receive" the clerk's letter until Monday, May 24th (R. 8). But this does not exclude the possibility that the letter arrived at his office on May 22nd in his absence. Granted that the 22nd was a Saturday, the fact remains that the clerk's office was open during business hours that day (F. R. C. P. 77(c)) and, furthermore, since the district court is "deemed always open for the purpose of filing any pleading or other proper paper" (F. R. C. P. 77(a)), the notice of appeal could have been filed that day at any time up to midnight by seeking out the clerk (or a judge, F. R. C. P. 5(e)) at his home and tendering the fee.

*Emphasis ours throughout this brief

**See also *Ray* v. *Morris*, 170 F. 2d 498, 499 (7 Cir. 1948); cf. *Yturbides Executors* v. *United States*, 22 How. (63 U. S.) 290 (1859).

The authorities urged by petitioner in support of his position that the notice of appeal should be treated as filed when received by the clerk on May 21, 1954 are inapposite or distinguishable.

None of the authorities cited at P. Br. 5-6 deals with the effect on the right to have a document filed of the failure to pay a prescribed statutory filing fee at the time the document is tendered for filing. They merely point out, for example, that the right cannot arise where the document is not delivered into the actual custody of the clerk, that "filing" implies that the document is accessible in the records of the court, and that it is the legal fact of filing, not a clerk's mark which controls. *Mutual Life Ins. Co.* v. *Phinney*, 178 U. S. 327 (1900), for example, cited at P. Br. 6, 13, dealt with the question of timely filing of a writ of error. The Court of Appeals for the Ninth Circuit had dismissed the appeal because the endorsement by the deputy clerk of the lower court merely stated that he had received a *copy* of the writ of error on a date within the prescribed time for taking the appeal, but did not state that the *original* writ of error had been received. This Court reversed, holding that it was the actual fact of filing which controlled and not the mere presence or absence of the endorsement on the original writ of error. An affidavit of the deputy clerk disclosed that the original writ of error had been presented and received with the copy, and had been treated by him as filed, although not endorsed by him because it was not his custom to endorse the original. Since the party seeking review had done in time all that was required of him, and the clerk's office had treated the original writ of error as in fact filed, the techical omission by the deputy clerk to endorse the

original writ of error was held not to be a jurisdictional defect.

In *Reynolds* v. *Imlay*, 118 F. 2d 53 (App. D. C. 1941), cited at P. Br. 7, there were conflicting statements in affidavits before the court regarding occurrences below relating to the time of tender to the clerk of a notice of appeal in an *in forma pauperis* action. The Court did not pass on the question of timely filing at all. It merely submitted the conflict of fact to the District Court under F. R. C. P. 75 (h), with the request that it settle the controversy and conform the record to the truth.

Petitioner argues (P. Br. 10-13) that the clerk *could* have filed the notice of appeal, even in the absence of the filing fee, and from this argument concludes that the failure of petitioner's attorney to make timely tender of that fee did not result in a jurisdictional defect. But the controlling question here is not whether the clerk *could* have filed the notice of appeal as a matter of grace, but whether petitioner's attorney had done all that the law required him to do to entitle him, as a matter or right, to have the clerk file the notice of appeal. Petitioner's abbreviated quotation (P. Br. 11) from 53 Corpus Juris 618 conveniently fails to include the following language at pp. 617-618 which immediately precedes that quoted by petitioner:

> ". . . valid filing . . . of an instrument is effected by delivering the instrument to the proper officer *and paying him the fees allowed by law; and it has been held that unless there is prepayment of such fees, effective recording cannot be predicated upon the delivery of an instrument to the proper officer for record . . . Further, where there is no prepayment of the required fee, the recording officer may refuse the paper to record.*"

Nor does the fact that the clerk *could* perhaps have filed the notice of appeal in the absence of the fee give him "arbitrary power, even to the extent of defeating appellate jurisdiction" (P. Br. 11). No clerk could validly preclude an effective filing of a notice of appeal timely received by him with the filing fee. But a prospective appellant's attorney *does* have the power to fail to make an effective filing. If appellate jurisdiction in this case can be said to have been "defeated", it was defeated by the initial delay of petitioner's attorney in attempting to take the appeal and his subsequent failure to observe the few simple statutory requirements in his belated attempt to do so.

Petitioner also argues (P. Br. 13-15) that affirmance of the Court of Appeals decision dismissing his attempted appeal would deny him impartial treatment under the law in view of four cases involving criminal appeals in which the courts held the appeals to be timely despite the fact that the clerk did not actually receive the filing fee within the statutory period. But in each of these cases, *Oddo* v. *United States*, 171 F. 2d 854 (2 Cir. 1949), cert. denied 337 U. S. 943 (1949), *Wallace* v. *United States*, 174 F. 2d 112 (8 Cir. 1949), cert. denied 337 U. S. 947 (1948), *Boykin* v. *Huff*, 121 F. 2d 865 (App. D. C. 1941), and *Williams* v. *United States*, 188 F. 2d 41 (App. D. C. 1951), the appellant, unlike petitioner here, was incarcerated and acting *pro se*. And in each of these cases the appellant, unlike petitioner's attorney here, did everything within his power to effect a timely filing of the appeal but was thwarted by the failure of an intermediate government official to do his duty. In the *Oddo* case the appellant had sent

mitted to the clerk for timely receipt. The Court of Appeals held that appellant should not be charged with the delay caused by prison routine in the transmission of the fee. The facts and holding of the *Wallace* case are substantially the same as those in the *Oddo* case. In the *Boykin* case appellant, who had handed his notice of appeal to the district judge within the time for appeal, was excused for failure to pay the filing fee in time because the judge had failed then to inform him of the filing fee requirement. And in the *Williams* case the notice of appeal was delivered by appellant to a United States marshal who could have transmitted it to the clerk in time for the clerk to notify appellant of the filing fee requirement, and receive the fee from him, within the time permitted for appeal. The Court held the appellant should not be charged with the marshal's delay. The doctrine of these cases has been distinguished, even in a criminal appeal, where the appellant was, as here, not acting *pro se* but was represented by counsel in the district. *Crow* v. *United States*, 203 F. 2d 670, 671n (9 Cir. 1953).

Finally, the intimation (P. Br. 9, 15) that F. R. C. P. 73(a), stating that failure of a party to take further steps to secure review *after filing* a notice of appeal shall not affect the validity of the appeal, is of aid to petitioner, clearly begs the question here, which is: Was the notice of appeal *filed* within the time prescribed by statute?

We believe it clear that it was not and that no proper basis exists in this case for deviation from the established rule.

III. THE *NUNC PRO TUNC* ORDER OF MAY 28, 1954 WAS A NULLITY.

The mere receipt by the clerk of the notice of appeal on May 21, 1954, without the statutory filing fee, not being in legal import a "filing" of the notice, and the period for appeal having expired on May 22nd without any filing of the notice, the subsequent *nunc pro tunc* order of May 28, 1954, and the changes in docket entry and endorsement made by the clerk pursuant to it, are clearly without legal significance and cannot cure the fatal jurisdictional defect created by the absence of a timely filing. As stated in *Credit Co.* v. *Ark. Central Railway*, 128 U. S. 258, 261 (1888):

> "The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. *When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter.*"

In accord: *Old Nick Williams Co.* v. *U. S.*, 215 U. S. 541 (1910).

The argument (P. Br. 8-10) that all the *nunc pro tunc* order did was to correct the record to conform to the facts turns on the contention that the notice should have been filed by the clerk on May 21, 1954, which is in itself an erroneous contention. The clerk's refusal to file the notice of appeal on May 21st *not* being "an act of omission of his official duty", the order is a nullity, even if considered from the standpoint of an attempted correction of an alleged

clerical mistake. For this reason F. R. C. P. 60(a)* and the case of *United States* v. *Todar,* 41 F. 2d 146 (7 Cir. 1930) are clearly distinguishable.

The court in the *Todar* case was dealing with 28 U. S. C. § 230, 1925 Ed. which required that an appeal be "applied for" in the court which gave the judgment, within three months after its rendition. Judgments had been entered on August 22, 1928. On November 19, 1928, there were filed in the clerk's office notices of appeal with proof of service, a motion for an extension of the time for filing bills of exceptions and assignments of errors, and an order of the court granting the motions. On December 11, 1928 another order was filed granting another 30-day extension, and on December 26, 1928 the bills of exceptions and assignments of error were filed. On January 14, 1929, an order was filed, "*nunc pro tunc* as of November 19, 1928", enlarging the time for docketing the appeals, and on March 30, 1929 an order was filed allowing appellant in each case an appeal, "*nunc pro tunc* as of November 19, 1928." The Court of Appeals held that the order of November 19, 1928 was a nullity because it was entered after commencement of a new term of court, and that since the bills of exceptions were thus not part of the record before it, the judgments below must be affirmed. Before so holding, it assumed that the order of March 30, 1929 "sufficiently manifests application for an allowance of the appeals by the District Court as of November 19, 1928" (p. 147). The Court of Appeals did not hold that the "*nunc pro tunc* order" validated an otherwise untimely appeal. Since it was the actual fact of allow-

*Note also that a portion of this Rule omitted in petitioner's quotation (P. Br. 9) states that the clerical mistakes referred to are [illegible] *other parts of the record* and errors

ance, rather than any formal order of allowance which controlled (*Brandies* v. *Cochran,* 105 U. S. 262, 1881), the Court of Appeals clearly believed, and in effect stated, that the District Judge had in fact allowed the appeal on November 19, 1928. His orders of November 19, December 11 and January 14, indicating a belief on his part that the appeal was in progress, corroborate this. The order of March 30, 1929 merely set the record straight; it was not a retroactive allowance of the appeal.

However, petitioner goes further than merely to urge that the significance of the *nunc pro tunc* order was to set the record straight. Adverting to F. R. C. P. 6(b)(2) and 60(b), and *Hill* v. *Hawes,* 320 U. S. 520 (1944), he implies (P. Br. 8-10) that somehow these Rules granted power to the district court to enter an order which could cure a previous substantive defect in jurisdiction. Neither the Rules nor the cited case lends support to petitioner's contention.

In the first place, petitioner *did not* proceed under F. R. C. P. 6(b)(2) or 60(b). These Rules require that application to the district court be made on motion. No motion, required to be in writing under F. R. C. P. 7(b)(1) and notice of which should be given to opposing counsel (cf. F. R. C. P. 6(d)), was made in this case. Petitioner's attorney proceeded *ex parte.* A similar *ex parte* procedure was held improper in *North Umberland Mining Co.* v. *Standard Acc. Ins. Co.,* 193 F. 2d 951, 952 (9 Cir. 1952).

In the second place, petitioner *could not* have proceeded under F. R. C. P. 6(b)(2) or 60(b).

Rule 6(b) specifically states that the court "may not extend the time for taking any action under Rules . . . 73(a) . . . except to the extent and under the conditions stated

that a notice of appeal be filed within 30 days from the entry of a judgment in a civil action in which the United States or an officer or agency thereof is not a party. Despite any contention to the contrary (P. Br. 9), it seems clear that if whatever a prospective appellant needed to do to perfect the filing of that notice was not done until after the prescribed 30 days, then any subsequent "*nunc pro tunc*" order would in fact be extending the time for taking the appeal.

Rule 73(a) sets forth only one exception to its 30-day requirement:

> "upon a showing of excusable neglect *based on a failure of a party to learn of the entry of the judgment* the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed".

This exception is also the only one set forth in 28 U. S. C. § 2107, *supra*, p. 3.

The exception was added by the 1946 amendment to Rule 73(a) and included in 28 U. S. C. § 2107 (1948), *after* the decision of this court in *Hill* v. *Hawes*, 320 U. S. 520 (1944). In the *Hill* case, this Court, adverting to F. R. C. P. 60, had approved the action of a district court in vacating an already entered judgment and entering a new judgment in the same terms, in order to permit a new running of the time for appeal, on the ground that the appellant had failed to make a timely filing of his notice of appeal because he had relied on the requirement of F. R. C. P. 77(d) that the clerk should serve a notice of entry of the original judgment by mail on the losing party, and that the clerk had failed to do so. As the notes of the Advisory Committee on Rules

clearly state, the exception added by the 1946 amendment to F. R. C. P. 73(a) (and to F. R. C. P. 77(d)*) were intended to recognize only the one specific excuse for a party's failure to have his notice of appeal filed within the prescribed time.** Certainly, "the time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlarged", *F. T. C.* v. *Minneapolis-Honeywell Co.*, 344 U. S. 206, 211 (1952).

In this case petitioner was not eligible to seek an extension of his time since his notice of appeal, dated May 20, 1954, indicated prior, timely knowledge that the judgment had been entered, knowledge based upon receipt of a certified copy of the judgment of April 22, 1954 and notice of its entry on April 23, 1954, promptly served upon him by respondents' attorneys (R. 2-6).***

---

*"Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73(a)."

**See also 6 Moore's Federal Practice (2d Ed. 1953) § 60.03, p. 4029: "in relation to the time for appeal to the court of appeals the district court's power is limited to extending the time for appeal, pursuant to Rule 73(a)". Cf. *Huff* v. *United States*, 192 F. 2d 911, 913-914 (5 Cir. 1951).

Professor Moore also states, § 60.03, p. 4028, "by virtue of the 1946 amendments to Rules 6(c), to 73(a) . . . and to 77(d), it is clear now that the doctrine of *Hill* v. *Hawes* has no vitality and that no provision in Rule 60(b) should be construed to give relief from a final judgment for any of the reasons advanced in *Hill* v. *Hawes*". In *Perrin* v. *Aluminum Co. of America*, 197 F. 2d 254, 255 (9 Cir. 1952) it was stated that " . . . certainly Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting the time for appeal . . .". Cf. *Ackerman* v. *United States*, 340 U. S. 193 (1950).

***The Notes of the Advisory Committee on Rules to the 1946 amendment to Rule 73(a) specifically state that "The party in whose favor the judgment is rendered may, as provided in Rule 77, himself serve a formal notice on the defeated party of the entry of the judgment and thus avoid the possibility of any extension of time for appeal under the amendment of Rule 73(a)." A similar statement is made by the Advisory Committee in its note to the 1946 amendment to Rule 77(d).

Conclusion

For the foregoing reasons, the order and judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

CHARLES H. WALKER,
Counsel for Respondents

Of Counsel:

CHARLES E. NICHOLS
HENRY J. ZAFIAN

March 9, 1955